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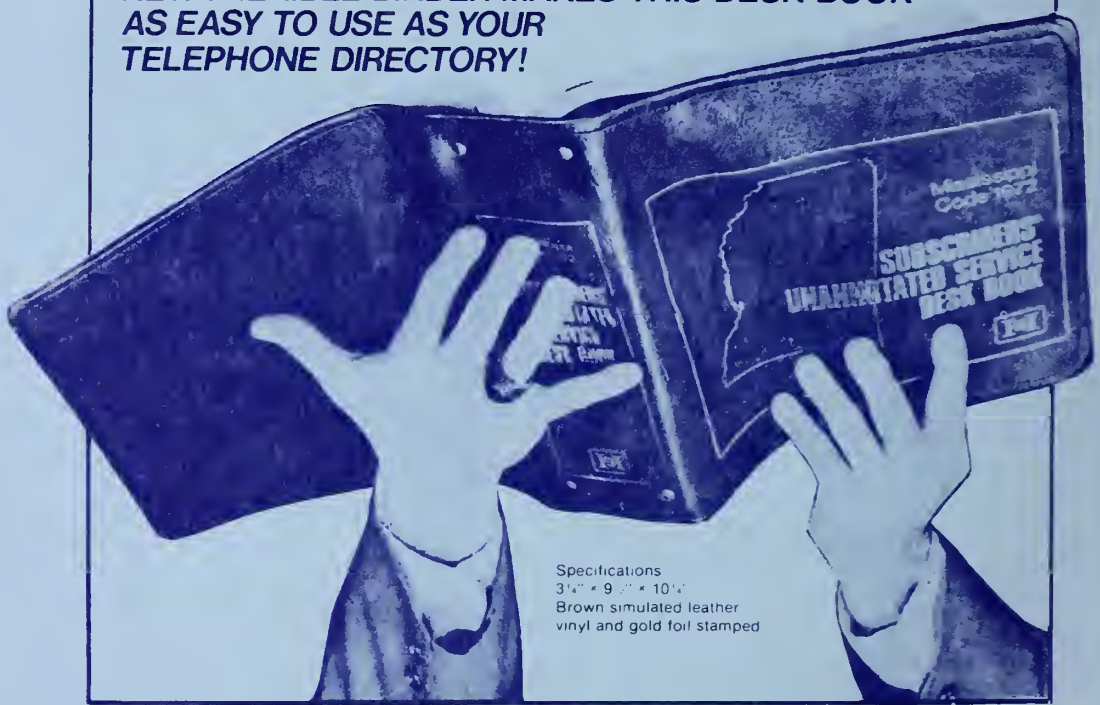

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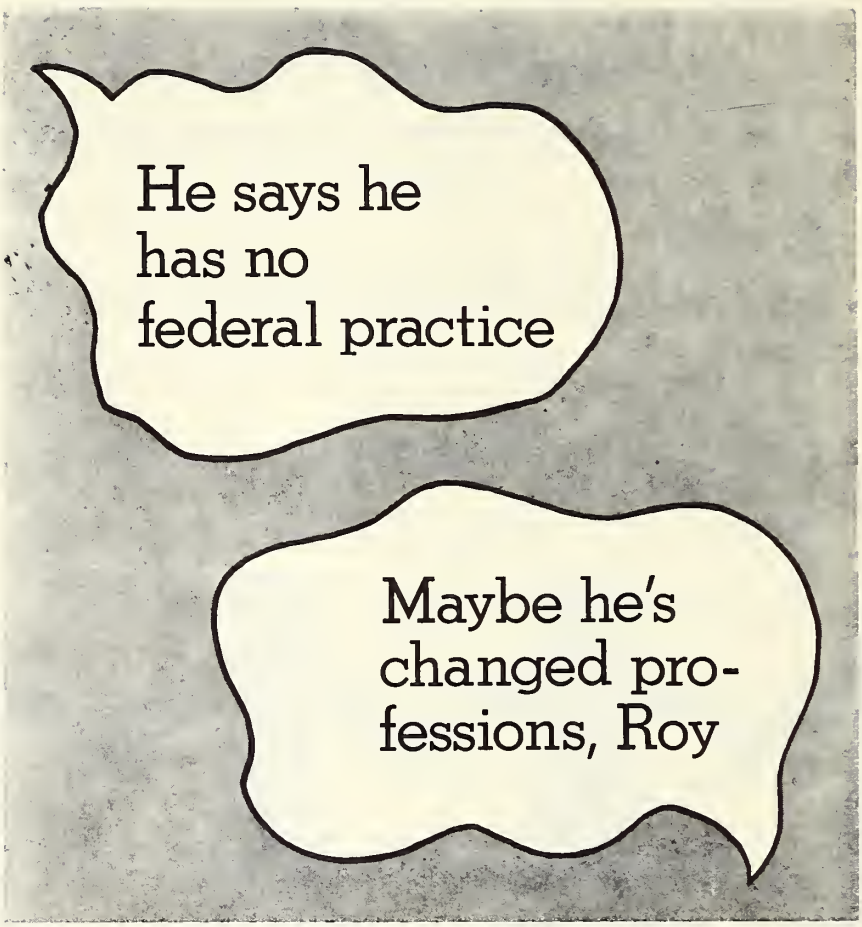

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THE 1972 OFFICIAL TEXT OF THE UNIFORM COMMERCIAL CODE: ANALYSIS OF CONFLICT OF LAWS PROVISIONS

*D. Fenton Adams**

I. Introduction

In 1971 the sponsors of the Uniform Commercial Code[1] [Code or U.C.C.] approved a substantial group of amendments to the Official Text[2] of the Code, dealing with the subject of secured transactions. State legislatures are now being urged to adopt these changes and at least two have already done so.[3] It is the purpose of this paper to survey the changes made in the conflict of laws provisions, with particular reference to their impact on Mississippi law should they be adopted here.[4]

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*Professor of Law, University of Mississippi. B.A., 1947, LL.B. 1949, J.D. 1968, Dickinson.

[1]The American Law Institute and the National Conference of Commissioners on Uniform State Laws.

[2]The term "Official Text" refers to a text approved by the sponsoring organizations and published with their authority. In few, if any, states where the Code has been adopted is the enacted version in complete accord with any Official Text. There have been a series of Official Texts, reflecting periodic "official" amendments. The one which has been the basis of most state adoptions is that of 1962. American Law Institute, Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Commercial Code: 1962 Official Text with Comments [hereinafter cited as 1962 Official Text with Comments]; *see* Permanent Editorial Board for the Uniform Commercial Code, Report No. 1, at 7-10 (1962) and Permanent Editorial Board for the Uniform Commercial Code, Report No. 2, at 11 (1965). In 1966 the Permanent Editorial Board approved a few amendments to the 1962 Official Text. Permanent Editorial Board for the Uniform Commercial Code, Report No. 3 (1967). The further amendments approved in 1971 led to the publication, first, of a 1972 Official Text of Article 9 (American Law Institute, Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Commercial Code: 1972 Official Text and Comments of Article 9 Secured Transactions [hereinafter cited as 1972 Official Text and Comments of Article 9 Secured Transactions]) then of a 1972 Official Text of the entire Code. American Law Institute, Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Commercial Code: 1972 Official Text with Comments [hereinafter cited as 1972 Official Text with Comments].

[3]Illinois, effective July 1, 1973; Arkansas, effective January 1, 1974. 11 U.C.C. Rep. Serv. Looseleaf Release No. 6 (March 7, 1973). The writer has been informed that several more states have enacted the amendments also.

[4]The Code was enacted in Mississippi in 1966 and took effect March 31, 1968. Minor amendments were made in 1968, 1970 and 1971. It appears in sections 75-1-101 through 75-10-104 of the Mississippi Code of 1972.

The new amendments to the Official Text are the result of almost 4 years of study by a committee of the Permanent Editorial Board for the Uniform Commercial Code[5] known as the Review Committee for Article 9.[6] Most of the Committee's recommendations were accepted by the Permanent Editorial Board and subsequently by the sponsoring organizations, although a few changes were made at each level of review.[7]

The Committee's study was prompted primarily by concern over the numerous nonuniform variations from the Official Text of Article 9 (Secured Transactions) which occurred in the states when the Code was enacted or by reason of subsequent amendments. As of November 1966, the Permanent Editorial Board reported, "337 non-uniform, nonofficial amendments had been made to the various sections of Article 9. Some sections had been amended by as many as 30 jurisdictions, each jurisdiction writing its own amendment without regard to the amendments made by other jurisdictions . . . . 47 of the 54 Sections of Article 9 had been non-uniformly amended."[8] This "distressing situation," plus suggestions for improvement of Article 9 which had been made by members of the practicing bar and legal educators, called for a "restudy in depth" of the Article.[9] The Code's sponsors hope that general adoption of the 1972 Official Text will produce a more uniform Uniform Code throughout the nation than now exists.[10]

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[5]The Permanent Editorial Board was established in 1961 to keep tabs on state variations from the Official Text, promote national uniformity, and propose amendments when needed. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 1, at 7-15 (1962).

[6]PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 3 at ix-xii (1967); REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, FINAL REPORT iii-ix (1971) [hereinafter cited as REVIEW COMMITTEE FINAL REPORT]. 1972 OFFICIAL TEXT AND COMMENTS OF ARTICLE 9 SECURED TRANSACTIONS vii-ix. The work of the Review Committee is briefly described by Peter F. Coogan in *The New UCC Article 9*, 86 HARV. L. REV. 477, 482 n.15 (1973). Mr. Coogan served as Consultant to the Committee. *Id.* at 477.

[7]1972 OFFICIAL TEXT AND COMMENTS OF ARTICLE 9 SECURED TRANSACTIONS viii. The changes made by the Editorial Board are noted in the Review Committee's Final Report in footnotes to the Appendix. REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, FINAL REPORT 193-248 (1971).

[8]PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 3, at x (1967).

[9]*Id.*

[10]Adoption of the newly approved amendments could be effected by complete repeal of the Code presently in effect in a state and enactment of the complete 1972 Official Text of the Code, by repeal of Article 9 alone and enactment of the 1972 Official Text of Article 9, plus amendment of the few other sections affected by changes in Article 9 (sections 1-105, 1-201, 2-107 and 5-116), or by amendment of the particular sections of the Code in

The 1972 Official Text, reflecting the amendments approved in 1971, differs from the 1962 Official Text, as modified by a few 1966 amendments,[11] in 34 sections of the earlier text, and two new sections are added.[12] Some sections have been only slightly altered, others completely rewritten. It would not be profitable to attempt to itemize all the *wording* changes involved. Some of them appear to have been made to improve the style or clarity of passages not likely to have been misread in their original form, and many are conforming changes made necessary in scattered sections of the Code by changes in the substance of a key section or two. It is of more value to consider the *effects* that would be produced by the revisions in the Code's text.[13]

Even approaching the changes from that angle, a comprehensive survey presents a formidable challenge. To keep the length of this article within reasonable limits, attention will be confined here to just one of the subject-matter areas significantly affected by the new amendments, that of conflict of laws, in the hope that other subjects dealt with by the amendments may be covered in later articles. Conflict of laws has been chosen because it involves some intriguing problems uniquely Mississippian, regarding both the present law and the law as it would be if the changes embodied in the 1972 Official Text were adopted in Mississippi.[14]

II. The Conflict of Laws Provisions

Most rules of Article 9 (Secured Transactions) of the U.C.C. (and, indeed, of the whole Code) are written in a manner that implicitly

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which officially-approved changes have been made. Both of the 1972 Official Text publications (cited in note 2 *supra*) include printings of the individual sections affected showing the changes made.

[11]See note 2 *supra*.

[12]The official publications of the 1972 Official Text of Article 9 and of the entire Code include a proposed Article 11, containing an effective date clause and provisions to facilitate transition from the previous text, but Article 11 has not been adopted as part of the Official Text. "It is submitted as a working draft which may be adapted as appropriate in each state." 1972 Official Text and Comments of Article 9 Secured Transactions 169; 1972 Official Text with Comments 735.

[13]This paper is meant to be expository rather than critical. The critical function cannot be completely divorced from the explanatory, however, and at places some gratuitous criticism is injected. A thoroughgoing evaluation of the 1972 Official Text, however, in comparison with the previous text or as compared with a hypothetical ideal text, has not been undertaken.

[14]The writer is by no means a specialist in the esoteric subject of conflict of laws. Unfortunately, a commercial lawyer must at times attempt to cope with its mysteries. Apology is offered for the superficiality of treatment, but it is hoped that enough understanding can be achieved to appreciate the principal effects of the proposed changes in the Code's choice-of-law provisions.

assumes that the law of the enacting state[15] unquestionably applies to govern the relationships of all persons involved. If all of the parties have been residents of the enacting state at all relevant times, if all relevant events occurred in that state, and if the collateral has been located in that state throughout, the assumption causes no difficulty. But where the transactions involved have interstate or international aspects, as often happens, there is need for rules of law to determine whether the enacting state's law or the law of some other jurisdiction is to govern some or all of the legal consequences of what has happened.[16] Sections 1-105, 9-102 and 9-103 of the 1962 Official Text provide rules for such choice-of-law problems with regard to secured transactions. They have been subjected to major surgery by the 1972 amendments.[17] To appreciate the changes involved, it may be helpful to review first the pattern of the rules of the 1962 Official Text, then compare those of the 1972 Text.

A. The 1962 *Official Text.*[18]

Section 1-105 is the Code's basic section dealing with its territorial application. Subsection (1) lays down two general rules. First, the parties to a transaction within the Code's subject-matter coverage may choose which jurisdiction's law is to govern their relations "when [the]

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[15]The U.C.C. has been enacted as the law of 49 states of the United States (Louisiana being the sole exception), the District of Columbia, and the Virgin Islands. 1972 OFFICIAL TEXT WITH COMMENTS Table 1, at xxxv. For simplicity of discussion the text will employ the term "enacting state" or "Code state" to refer to any jurisdiction in which the U.C.C. has been enacted.

[16]In view of the nearly universal adoption of the U.C.C. in this country, the question may be raised why there is need for choice-of-law rules at all. Doubtless, in the great majority of secured transactions, there is none. See R. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 9-1, at 205 (1973) [hereinafter cited as R. HENSON, SECURED TRANSACTIONS]. But Louisiana has not adopted the Code, a fact of some significance to Mississippi lawyers certainly, and it has not become law in other nations. Moreover, since even the jurisdictions which have adopted it have made varying changes in its wording, and it is certain that the adoption of the 1972 Official Text will not be simultaneous in all Code states, conflict of laws problems are a real possibility. Even where the *rules* are the same in all states, choice of law will at times be necessary to determine where filing should be made to perfect a security interest. *See also* Weintraub, *Choice of Law in Secured Personal Property Transactions: The Impact of Article 9 of the Uniform Commercial Code*, 68 MICH. L. REV. 683, 684-85 (1970).

[17]Although the amendments were approved by the sponsoring organizations in 1971, they will be referred to in the text as the "1972 amendments," as a short-form way of referring to the changes from the prior Official Text embodied in the 1972 Official Text. The official publication of the 1972 Official Text employs the same usage. 1972 OFFICIAL TEXT WITH COMMENTS 739 *et seq.*

[18]For the most part the Mississippi U.C.C. is in accord with the 1962 Official Text. Deviations will be noted either in the text or in footnotes.

transaction bears a reasonable relation to this state and also to another state or nation . . . ." Second, "[f]ailing such agreement this Act applies to transactions bearing an appropriate relation to this state." Neither "reasonable relation" nor "appropriate relation" is defined by the Act. The Comments suggest that the terms are not synonymous, and that the difference is, roughly, one between *some* significant contact between a jurisdiction and a transaction ("reasonable relation") and *the most* significant relation with the transaction ("appropriate relation").[19] Where the parties have not effectively chosen the jurisdiction whose law is to apply,[20] the courts of a Code state appear to be at liberty to employ any choice-of-law rules that they would use in the absence of statutory direction,[21] although the Comments suggest that the fact that the Code is in force in a particular jurisdiction is a factor to be thrown onto the scales in favor of finding an "appropriate relation" to that jurisdiction.[22]

The general rules of section 1-105(1) are, however, subject to exceptions listed in subsection (2): "Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of law rules) so specified!" Among the provisions referred to are those relating to "Policy and Scope of the Article on Secured Transactions. Sections 9-102 and 9-103."

Examination of sections 9-102 and 9-103 reveals that a large portion, if not all, of the subject of secured transactions[23] is removed from the operation of the general rules of 1-105(1) and governed by special rules which operate more mechanically and inflexibly than those of

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[19]1962 OFFICIAL TEXT WITH COMMENTS § 1-105, Comments 1-3.

[20]*I.e.*, if the parties have not made a choice or have chosen a jurisdiction which does not bear a "reasonable relation" to the transaction. Professor Henson reads section 1-105(1) as not providing a rule for the case where the parties do choose a state whose law is to govern but the relation between that state and the transaction is not "reasonable." R. HENSON, SECURED TRANSACTIONS § 9-1, at 209-10.

[21]1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 10.8, text at n.1 (1965) [hereinafter cited as 1 G. GILMORE, SECURITY INTERESTS]. *But see* Comment, *Conflicts of Laws and The "Appropriate Relation" Test of Section 1-105 of the Uniform Commercial Code*, 40 GEO. WASH. L. REV. 797 (1972).

[22]1962 OFFICIAL TEXT WITH COMMENTS § 1-105, Comment 3.

[23]There is room for debate about the extent to which the rules of section 1-105(1) are superseded by sections 9-102 and 9-103 when the issue presented deals with the relations between secured party and debtor as *seller and buyer*, especially where Article 2 provides relevant rules and Article 9 does not. *See, e.g.*, Weintraub, *supra* note 16, at 691-97. A similar problem arises when the issue is one not dealt with by the Code; *e.g.*, whether, where a security interest is based on a loan, the loan itself is usurious. *See* Kripke, *Mr. Levenberg's Criticism of the Final Report of the Article 9 Review Committee: A Reply*, 56 MINN. L. REV. 805, 815 (1972). In the latter case, however, since the Code's substantive provisions do not apply at all, it may be that none of the Code's conflicts rules are applicable.

section 1-105(1). It is inferable that greater certainty and predictability was felt necessary in determining choice of applicable law in the secured transactions context; however, in view of the ambiguities and difficulties of application of sections 9-102 and 9-103, that aim has been at least partially defeated.

Section 9-102 is captioned, "Policy and Scope of Article," and provides, in its first sentence, the basic choice-of-law rule for the Secured Transactions article: "(1) Except as otherwise provided in Section 9-103 . . . this Article applies so far as concerns any personal property and fixtures *within the jurisdiction of this state (a)* [to any secured transaction involving such property as collateral]." (Emphasis supplied.) The Code does not indicate when personal property is "within the jurisdiction" of the state, but the assumption of the draftsmen appears to have been that the normal test would be the location of the property within the state.[24]

This simple "situs" test singles out as *the* significant fact governing choice of law for secured transactions the location of the collateral, rather than the residence of any of the parties, the place where the security agreement is made or to be performed, or any of the other factors that might conceivably enter into selection of the state with the most "appropriate relation" to the transaction. It appears also to rule out selection of any other state by the parties as the state whose law is to apply.[25]

Application of the test would be difficult and uncertain in two types of cases, however. If collateral is of an intangible character, such as a right to payment for goods sold on unsecured credit (an "account" in Article 9 terminology[26]), it can be "located" within a state in only a metaphysical sense. Even if the collateral is tangible personal property ("goods" under Article 9[27]), it may be moved from one jurisdiction to another after the initiation of a secured transaction and the question would arise as to how much of the transaction is to be governed by the law of each of the jurisdictions in which it has been.[28] Section 9-103 deals with problems of both types.

1. Goods

Subsections (2), (3) and (4) of section 9-103 provide rules for deter-

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[24]1962 OFFICIAL TEXT WITH COMMENTS § 9-102, Comment 3; § 9-103, Comment 1. *See also* 1 G. GILMORE, SECURITY INTERESTS §§ 10.8, 22.3 *et seq.*

[25]Especially when section 9-102 is read together with section 1-105(2). *See* 1 G. GILMORE, SECURITY INTERESTS § 10.8, text at n.4.

[26]1962 OFFICIAL TEXT WITH COMMENTS § 9-106.

[27]*Id.* § 9-105(1)(f).

[28]The ambiguity of section 9-102's "situs" rule when goods move from state to state is pointed out by Professor Weintraub. Weintraub, *supra* note 16, at 702-05.

mining the applicable law where goods collateral moves from one jurisdiction to another. Subsections (2) and (4) are concerned with special classes of goods; subsection (3) covers the rest, which might be termed "ordinary goods."[29]

a. *Ordinary Goods.* Subsection (3) is limited in scope to cases where goods coming into "this state" are "already subject to a security interest." Presumably goods would not be "subject to a security interest" unless a security interest had come into existence (in Article 9 terminology, unless it had "attached" to the goods[30]). If a secured transaction had been initiated in another jurisdiction but not carried to the point where a security interest would come into existence under the law of that jurisdiction before the goods were brought into "this state," it would seem that section 9-103(3) would have no application; rather, section 9-102, with *its* "situs" rule, would apply. But what result would that produce? Here the ambiguity of 9-102 regarding the time as of which it is to be applied raises difficulty. It could be read as meaning that the Article 9 of "this state" is to be applied if the goods are in "this state" when the security interest would come into existence under the law of "this state," but it could also be read as meaning that "this state's" Article 9 is to be applied if the goods are in the state at the time the events occur which give rise to the dispute, or even at the time the question must be settled by a court.[31]

When section 9-102 is read together with section 9-103(3), the reading which best coordinates the two seems to be that 9-102 refers to the time a security interest comes into existence (attaches). More precisely, if a contention is made that a security interest attached to goods while they were located in "this state," the courts of "this state" are directed to apply Article 9 of "this state" to determine the validity of the contention. If it is claimed that a security interest attached while the goods were in another jurisdiction, it is a fair inference that the courts of "this state" are to apply the law of that jurisdiction to determine the validity of the contention.[32]

Should the determination be that the security interest first attached in "this state," then a possible reading of 9-102 is that, as far as "this state" is concerned, *its* Article 9 will govern any other questions that may arise concerning the security interest and its effects, even

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[29]In view of the types of goods taken out of the operation of subsection (3) by subsections (2) and (4), subsection (3) is of fairly narrow scope and applies principally to consumer goods, equipment designed to be kept in one place in normal use, and inventory held for sale, when such goods are not covered by certificates of title. *See* 1 G. GILMORE, SECURITY INTERESTS § 22.8; Weintraub, *supra* note 16, at 712.

[30]1962 OFFICIAL TEXT WITH COMMENTS § 9-204(1).

[31]*See* Weintraub, *supra* note 16, at 702-05.

[32]*See* 1 G. GILMORE, SECURITY INTERESTS § 10.8 n.5.

though the goods may subsequently be taken permanently to another jurisdiction, the events giving rise to a subsequent dispute all occur there, and the parties have lost all contact with this state. The soundness of this reading is questionable, and if it is accepted, the wisdom, and even the validity, of the rule may be challenged.[33] Another possible reading is that when the goods are removed from "this state," its Article 9 ceases to apply to determine the legal effects of incidents occurring subsequent to the removal; rather, the law of the jurisdiction where the goods then are is to be referred to. However, this interpretation leads to the conclusion that the rule of section 9-102 sometimes refers to the time of attachment of a security interest, sometimes to other times, and its application is anything but certain. Unfortunately, the language of the Code text is too ambiguous to provide satisfactory guidance.

Assuming, however, that the goods are "already subject to a security interest" when brought into a Code state, subsection (3) of 9-103 provides that:

> the validity of the security interest in this state is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this state and it was brought into this state within 30 days after the security interest attached for purposes other than transportation through this state, then the validity of the security interest in this state is to be determined by the law of this state.

There follow several sentences relating to the "perfected" status of the security interest, but before they are considered, the meaning of "validity" needs investigation. The passage just quoted seems to assume that the security interest in question has attached in another jurisdiction under the law of that jurisdiction, yet its "validity" is to be governed in "this state" either by the law of that jurisdiction or this one, depending upon whether removal of the collateral to "this state" was contemplated by the parties to the transaction when the security interest attached, and it subsequently occurred within 30 days. If the law of the other jurisdiction determines whether a security interest "attached" to the goods before they were brought into "this state," what remaining questions of "validity" might there be for the law of "this state" to govern?[34]

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[33]*See* Weintraub, *supra* note 16, at 702-03.

[34]Possibly the meaning is that requirements for enforceability, rather than attachment, of the security interest are referred to. *Compare* section 9-204(1) *with* 9-203(1). However, if so, "validity" seems a misleading term. The reference could be to law outside the Code affecting validity, such as usury statutes. Still another possibility is that "validity" refers to all aspects of a secured transaction other than "perfection." See 2 G.

The Comments[35] say "validity" refers to "such matters as formal requisites." If "formal requisites" include the requirements for attachment of a security interest, as would seem a natural inference, then the first two sentences of 9-103(3) would apparently have to be read as meaning that if a *contention* is made that goods which have been brought into "this state" were subjected to a security interest while they were in another jurisdiction, the law of that jurisdiction is to be applied to the facts to determine whether a valid security interest did indeed attach there as contended, *unless* the facts also establish that at the time of the alleged attachment the parties to the transaction expected the property to be kept in "this state" and it was actually brought here within 30 days, in which case the law of "this state" is to be applied to determine whether a valid security interest attached in the other state.[36]

"Perfection" is the subject of the last three sentences of subsection (3). The principal rule is that, "If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, the security interest continues perfected in this state for four months and also thereafter if within the four month period it is perfected in this state."

The meaning of "perfection," or at least its minimum meaning,[37] seems fairly clear, with reference to the law of any state in which the U.C.C. is in force. Its meaning with reference to the law of a non-Code jurisdiction could be more troublesome.[38] However, an effort to define the concept so as to take into consideration the possible variations in

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GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.11, at 1276 (1965) [hereinafter cited as 2 G. GILMORE, SECURITY INTERESTS].

[35]1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 7.

[36]Comment 7 to section 9-103 suggests that the effect of the second sentence of 9-103(3) is to give the parties a limited power to choose the law applicable to "such matters as formal requisites," by agreeing that the goods are to be kept in another state than the one in which they are at the time. However, it should be noted that the Code text refers to the understanding of the parties "at the time the security interest attached," rather than the time they contracted. "Attachment" can occur, under the Code, at a later time than the time a security agreement is made. *See* § 9-204(1).

[37]Article 9 uses the term "perfect" and its variants in many sections and deals in detail with how a security interest may be perfected. Probably "perfection" includes rules as to the effect of perfection; *i.e.*, priorities between the secured party and rival claimants to the collateral. *But see* note 49 *infra*. A controversy has arisen, however, as to whether "perfection," as used in section 9-103, can be stretched to include rules of law governing foreclosure of security interests after default. Professor Gilmore has taken the position that it is that broad a term, 2 G. GILMORE, SECURITY INTERESTS § 44.9.11, at 1276-77, while Professor Weintraub has argued that default rights are governed by the "situs" rule of section 9-102(1). Weintraub, *supra* note 16, at 699. *See also* R. HENSON, SECURED TRANSACTIONS § 9-1, at 208-09.

[38]*See* Casterline v. GMAC, 195 Pa. Super. 344, 171 A.2d 813 (1961).

terminology in non-Code jurisdictions or to state the meaning of "perfection" in terms of its effect would probably be more trouble than the effort was worth.

There seems to be some slippage between the second and third sentences of section 9-103(3). If the parties to a secured transaction intend, even though the goods are in another jurisdiction when the security interest attaches, that the property is to be kept in "this state," at least if they are actually brought here within 30 days, then, according to the second sentence, the law of "this state" governs the *validity* of the security interest. But the third sentence gives the security interest *perfected* status for 4 months in "this state" after the goods are brought here if the interest was perfected under the law of the state where the goods were at the time of attachment of the security interest, and no distinction is made between cases where the parties to the transaction expected the goods to stay in that other jurisdiction and those where they anticipated removal to "this state." Thus, the possibility exists of goods being subjected to a security interest in one state, with every expectation that they will be promptly taken to another state, but because the secured party perfects his security interest by filing in the state where the transaction occurred, he will be assured of a perfected interest for 4 months in the state to which the goods are promptly removed (assuming it to be a Code state), though he makes no filing in that state. The result seems inconsistent with the evident purpose of the 4-month rule, to give a secured party who did *not* expect the collateral to be removed from the state where the security interest was created a reasonable opportunity to discover that it has nevertheless been removed, to trace it and to take steps to perfect his interest there, without losing the perfection of his security interest in the meantime,[39] but a literal reading would produce the result.[40]

If it be assumed that the second sentence of 9-103(3) governs perfection as well as validity, another ambiguity lurks in the wording that the law of "this state" applies "if the parties . . . understood . . . that the

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[39]*See* 1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 7.

[40]Professor Gilmore has contended that the third sentence of subsection (3) of 9-103 should be read as referring only to cases where the state of original perfection was one where the parties to the secured transaction expected the goods to be kept at the time of the transaction, and that the second sentence should be read as making the law of "this state" applicable to govern both "validity" and "perfection" in the cases to which it applies. 1 G. GILMORE, SECURITY INTERESTS § 22.9. This position is accepted by dictum in *In re* Dennis Mitchell Industries, Inc., 419 F.2d 349, 357, 6 UCC REP. SERV. 573, 585 (3rd Cir. 1969), *rev'g* 280 F. Supp. 433, 4 UCC REP. SERV. 1113 (E.D. Pa. 1968). Carl W. Funk, a member of the Article 9 Review Committee and counsel to the Permanent Editorial Board, appears to agree. Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code*, 27 BUS. LAW. 321, 338-39 (1971).

property would be kept in this state *and* it was brought into this state within 30 days . . . ." (Emphasis supplied.) Suppose goods are sold in State A, seller reserving a security interest in them, and the parties understand that the goods are to be kept in State B. Seller files in State B immediately. However, the goods are not in fact taken to State B within 30 days; rather, they stay in State A or are taken to State C. Assume that all the states involved are Code states. Did seller succeed in perfecting his security interest by his filing in State B? If so, did it cease to be a perfected interest at the end of the 30-day period? Or was it necessary that the goods actually have been taken into State B within the 30-day period in order for seller's filing there to be effective to perfect his security interest at all?[41]

If the law of the jurisdiction from which the goods were brought into "this state" governs perfection of the security interest, and if the interest was already perfected under the law of that jurisdiction when the goods were brought into "this state," then, according to the third sentence of subsection (3), the perfected status of the security interest in "this state" continues for a period of 4 months from the time the goods were brought into "this state," and the third and fourth sentences, taken together, imply that if it is not perfected in this state within the 4-month period, perfection lapses at the end of that time. It is not clear from this text, however, and it has been a matter of dispute,[42] whether, if the security interest is not "perfected in this state" within the 4 months, it is treated as unperfected only from the end of that period onward, so as to leave junior any conflicting interests which arose during the 4 months and which would be subordinate to a perfected security interest, or becomes retroactively unperfected, so as to give priority to intervening interests which would be senior to an unperfected security interest.

If the loss of perfection is not retroactive, the act opens the possibility of a circular-priority problem. Imagine a case where *S*, lender, acquires and perfects by filing a security interest in "ordinary goods" of the debtor, *D*, while they are located in State A, there being no understanding that the goods are to be kept in another state. While *S*'s secu-

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[41]Supporting the 30-day temporary perfection interpretation are the authorities cited note 40 *supra*. *See also* Taylor, *Section 9-103(3) of the UCC: Ambiguities, Unanswered Questions and Suggestions for Statutory Revision*, 35 TENN. L. REV. 235 (1968).

[42]*See* R. HENSON, SECURED TRANSACTIONS § 9-5; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 23-18, at 848-50 (1972) [hereinafter cited as WHITE & SUMMERS, U.C.C.], and authorities there cited; Kripke, *supra* note 23, at 812. The Official Comments take the position that the holder of a perfected conflicting security interest, junior during the 4-month period, would have senior status after the expiration of that period, but they deal ambiguously with levying creditors and other purchasers. 1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 7.

rity interest is still perfected under the law of State A, *D* removes the goods to State B, a Code state. Two months later *T* extends credit to *D*, takes a security interest in the same goods and perfects it by filing in State B. Four months after the goods have been removed to State B, *S*'s security interest becomes unperfected under the law of State B because *S* has failed to take the necessary steps to continue his perfection there. Then *X* extends credit to *D* and takes a security interest in the goods, which he perfects by filing in State B. In the event of a contest among *S*, *T* and *X* in the courts of State B for priority in right to the collateral, who prevails? As between *S* and *T*, since *S*'s security interest was perfected at the time *T* acquired and perfected his and we are assuming that *S*'s later loss of perfection does not affect his relation to *T*, *S* is entitled to priority under either the rule of section 9-312(5)(a) (that where both security interests are perfected by filing, the one who filed first prevails) or the rule of section 9-312(5)(b) (that where both interests are not perfected by filing, the one who perfected first prevails). As between *T* and *X*, *T* is clearly entitled to priority under the rule of 9-312(5)(a). But as between *X* and *S*, *X* is apparently entitled to priority over *S*, by virtue of the implication of 9-312(5)[43] that a perfected security interest takes priority over an unperfected one. Thus *S* is prior to *T*, who is prior to *X*, who is prior to *S*. The Code offers no rule for breaking the magic circle, so the courts are on their own.[44]

To perfect the security interest "in this state" within the 4-month period, in order to continue the perfected status beyond that time, presumably requires the secured party to take whatever steps would be required under the Code of "this state" to perfect a security interest which had been created in this state, normally by filing in the state to which the goods have been removed or by taking possession of them. In the case of an automatically perfected security interest (*i.e.*, one perfected without filing or possession, as in the case of a purchase money interest in consumer goods[45]), it appears that the secured party need do nothing at all to continue the perfected status of his security interest indefinitely, though the Code is not clear on the point.[46]

It is conceivable that the third sentence of 9-103(3) could operate to give the secured party a perfected security interest in the state to which goods are removed for a longer period than it would have remained perfected if the goods had remained in the jurisdiction where the security interest was originally created and perfected. For example, if

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[43]See 1962 OFFICIAL TEXT WITH COMMENTS § 9-312, Comment 4. *But see* 2 G. GILMORE, SECURITY INTERESTS § 34.2.

[44]*See* REVIEW COMMITTEE, FINAL REPORT 229, item E-49, and 236, item F-23.

[45]1962 OFFICIAL TEXT WITH COMMENTS §§ 9-302(1)(d), 9-201.

[46]*See* R. HENSON, SECURED TRANSACTIONS § 9-5.

perfection was originally achieved by filing under that state's Code, the perfection would automatically terminate there at the end of 5 years unless a continuation statement were filed.[47] Yet if the goods were removed to another Code state 1 day before such termination occurred, the Code of the second state would apparently operate to continue the perfected status of the security interest for at least 4 months.

The last two sentences of section 9-103(3) indicate that even though goods brought into "this state" from another state are subject to an unperfected security interest at the time, or the 4-month period of continued perfection provided by the third sentence runs out without reperfection in "this state" having occurred, it may be perfected by taking the appropriate steps in "this state," but in either case "perfection dates from the time of perfection in this state."

The operation of subsection (3) is affected in Mississippi by provisions of the Mississippi Motor Vehicle Title Law, which is considered in section II. A. 1. d. *infra*.

b. *Mobile Goods.* A special class of goods, dealt with in subsection (2) of section 9-103, is what may be termed, for convenience of reference, "mobile goods." More precisely, they are "goods of a type which are normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like) if such goods are classified as equipment or classed as inventory by reason of their being leased by the debtor to others."[48] The type of goods referred to is not merely such as are designed to be readily moved from place to place but goods used in a business (otherwise than as inventory held for sale); the family car, for example, would not come within this category.

The general rule as to the law governing "validity and perfection of a security interest and the possibility and effect of proper filing"[49]

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[47]1962 OFFICIAL TEXT WITH COMMENTS § 9-403(2), (3). It could terminate even earlier if the filed financing statement showed a maturity date of fewer than 5 years for the obligation secured. *Id.*

[48]*Id.* § 9-103(2), first sentence.

[49]It will be noted that, although section 9-103(3) refers only to the law governing "validity" and "perfection," subsection (2) speaks of the law governing "validity and perfection of a security interest *and the possibility and effect of proper filing.*" (Emphasis supplied.) Does the additional language add anything of significance to "validity and perfection"? One could infer, from the difference in wording of the two subsections, that "perfection" in subsection (3) does not include law as to "the possibility and effect of proper filing." That reading would place a seemingly irrational limitation on even the most natural minimal content of the term "perfection" and seems inconsistent with the apparent intent of subsection (3) to give the secured party the same degree of protection for a period of 4 months in the state to which "ordinary goods" collateral is removed as he would have had in the state where he acquired and perfected his security interest, in a

with respect to such goods is that the law of the state where the "chief place of business" of the debtor is located controls,[50] regardless of where the goods may actually be at any particular time.[51] The departure from the basic situs-of-the-goods test for determining the applicable law[52] is justified on the ground that as to goods used in business which are in normal use moved from state to state it would impose undue hardship on the secured party to require him to file financing statements in all the jurisdictions to which the goods may be taken to be kept for an appreciable period of time.[53] The rule goes further than necessary to implement this reason, however, for it makes no exception for mobile goods which are in fact never or seldom moved,[54] and the law of the state of the debtor's chief place of business governs not merely the question of where to file but all questions of validity and perfection. In another respect, the rule seems too narrowly stated, in the light of its reason, in that it apparently does not apply to mobile inventory *held for lease,* as distinguished from such inventory actually leased.[55]

Determining what is the debtor's "chief place of business" in the case of a multi-state enterprise may be difficult, especially since the expression is not defined by the Code;[56] and the rule leaves open the

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case where he had no reason to expect removal at the time the security interest was created. *See* Weintraub, *supra* note 16, at 715. Professor Gilmore has expressed the view that the additional references to possibility and effect of filing in section 9-103(1), and presumably those of 9-103(2), add nothing to the scope of these subsections that is not brought within the scope of subsection (3) by the simple references to "perfection." 1 G. GILMORE, SECURITY INTERESTS §§ 10.9, 10.10.

[50]1962 OFFICIAL TEXT WITH COMMENTS § 9-103(2), first and second sentences.

[51]The statement of the "general rule" in the text may be an oversimplification. The wording of subsection (2) of 9-103 is that if the chief place of business of the debtor is in "this state," then "this Article" governs validity and perfection of a security interest in his mobile goods. "Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern." This suggests that if the debtor's chief place of business is in another state, the courts of "this state" are to apply the whole law of the other state to settle all questions of validity and perfection of security interests in mobile goods collateral, but if the chief place of business of the debtor is in "this state," then only Article 9 of "this state's" Code applies. In the latter case, if it should develop that some matter of "validity" or "perfection" were not dealt with in "this state's" Article 9, what law would govern? The probability is that the drafters intended the whole law of "this state" to apply, not merely Code Article 9.

[52]The rules of section 9-103(3) for "ordinary goods" can be regarded as simply a spelling out, with some modification, of the general "situs" rule laid down by section 9-102.

[53]1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 3.

[54]*Id.* § 9-103, Comment 4.

[55]R. HENSON, SECURED TRANSACTIONS § 9-3.

[56]This is conceded in the official comments but brushed off with the observation that "[a] secured party in such a case may easily protect himself at no great additional burden by filing in each of several places." 1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment

question of what law applies if the debtor is not in business.

A refiling may be required in a case where perfection was achieved by filing in the state of the debtor's chief place of business and the chief place of business is then shifted to another jurisdiction. Section 9-103(2) provides that, "If the chief place of business of a debtor *is* in this state, this Article governs . . . perfection . . . . Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business *is* located shall govern." (Emphasis supplied.) The critical question is the time to which "is" refers. If it has reference to the time of original perfection of the security interest, perfection would probably continue in all Code states despite the change in the debtor's chief place of business; if the time referred to is the time when a conflicting claim to the collateral arises and perfection becomes critical, perfection would probably lapse in all Code states upon the removal of the debtor's chief place of business to the new jurisdiction, and reperfection under the law of that jurisdiction would be necessary. The Comments take the latter view,[57] but the text of the Code is hardly clear.[58] In the event that reperfection is necessary, no provision is made in the Act for a temporary continuance of perfection to give the secured party time to learn of the change and take steps to renew his perfection; a court might be persuaded to apply the 4-month rule of 9-103(3) by analogy,[59] but that requires some manhandling of the statutory text.

The third sentence of section 9-103(2) provides a special rule for cases where the debtor's chief place of business is located in a jurisdiction "which does not provide for perfection of the security interest by filing or recording in that jurisdiction." In such case, "the security interest may be perfected by filing in this state." The meaning of this sentence is not clear, and it is not mentioned in the Comments to section 9-103. Professor Gilmore, who was one of the principal draftsmen of Article 9,[60] has explained the sentence as intended to apply to this

3. The draftsmen define "chief place of business" as "the place from which in fact the debtor manages the main part of his business operations." *Id.*

[57]*See* Official Comment cited note 56 *supra*; Weintraub, *supra* note 16, at 711-12. *But see* General Elec. Credit Corp. v. Western Crane and Rigging Co., 184 Neb. 212, 166 N.W. 2d 409, 6 UCC REP. SERV. 67 (1969). The Comment points out that section 9-401(3) is inapplicable. That subsection provides: "A filing which is made in a proper place in this state continues effective even though the debtor's residence or place of business . . . is thereafter changed." The rule would be inapplicable to the situation under consideration because it applies only where the original filing was "in this state."

[58]Professor Gilmore considers the Act silent on the question whether the security interest, once perfected in the state of the debtor's chief place of business, becomes unperfected if the chief place of business is shifted to another state. 1 G. GILMORE, SECURITY INTERESTS § 22.7 n.9.

[59]*See* J. WHITE & R. SUMMERS, U.C.C. § 23-19.

[60]*See* 1 G. GILMORE, SECURITY INTERESTS x - xi.

sort of case:[61] Mobile goods collateral is located in State A, a Code state, but the debtor's chief place of business is in State B, which has not adopted the Code. If litigation arose in State A, the general rule of 9-103(2) would direct State A's courts to apply the law of State B to determine the perfected status of a security interest in the goods. But if the law of State B does not recognize the chief place of business of the debtor as giving it jurisdiction over perfection of security interests in goods located in another state, reference to the perfection law of State B will be useless. In that event, this sentence calls upon State A's courts to apply their own Code.

On that interpretation, the third sentence of 9-103(2) may add very little to the second, for that sentence commands that where the debtor's chief place of business is in another state, the courts of the Code state are to apply "the law (*including the conflict of laws rules*) of the jurisdiction where such chief place of business is located." (Emphasis supplied.) If State B rejects the chief-place-of-business test to determine the applicable law, it would probably refer to the law of the state in which the collateral was located, State A, and thus the courts of State A are called upon to apply their own Code.[62]

Although both the third sentence of subsection (2), as construed by Professor Gilmore, and the argument as to the effect of the "conflict of laws rules" reference in the second sentence would give the secured party a means of perfecting his security interests, it is done, in effect, by reclassifying the goods as "ordinary goods." Presumably, if filing were made in "this state" and the goods were subsequently moved to another state (at least if it were a Code state) a new filing would be required there in order to be sure of continuing perfection under the law of that state. Thus the secured party is exposed to the hardship against which subsection (2) is designed to protect him—the need for multiple filings as to goods often moved from state to state in normal use.

There is a final sentence in section 9-103(2), dealing with the definition of "chief place of business" where the collateral is an airplane and the debtor a foreign air carrier under the Federal Aviation Act of 1958. The Official Text offers this sentence for optional enactment; it was not included in the Mississippi version of the Code.

The Mississippi Motor Vehicle Title Law modifies the operation of 9-103(2). Its impact will be considered in section II A. 1 d.

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[61]*Id.* § 10.10, text at n.1.

[62]*See id.* §§ 10.10, text at n.1, 22.3; 1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 6. Professor Gilmore notes that whereas the first and second sentences of section 9-103(2) deal with what law applies to determine both validity and perfection of security interests, the third sentence mentions only perfection. He considers this a drafting inadvertance; local law should be taken to govern both validity and perfection. 1 G. GILMORE, SECURITY INTERESTS § 10.10, at 326.

c. *Certificated Goods.* A second special class of goods, dealt with in subsection (4) of section 9-103, is goods[63] "covered by a certificate of title issued under a statute of this state or any other jurisdiction which requires indication on a certificate of title of any security interest in the property as a condition of perfection . . . ." The rule applicable to such collateral is that if the property "is covered" by such a certificate, then, "[n]otwithstanding subsections (2) and (3), . . . perfection is governed by the law of the jurisdiction which issued the certificate." The principal application of this subsection is to motor vehicles.[64]

The purpose of subsection (4) is evidently to defer to state certificate of title systems for controlling perfection of security interests, to the extent that such systems provide effective means of giving notice of security interests through the certificate device.[65]

It will be noted that the rule of 9-103(4), in express terms at least, deals only with what law will govern "perfection" of security interests. Matters of "validity," whatever may come within that term,[66] are presumably governed by the law indicated by subsection (2) or subsection (3), depending on whether "mobile goods" or "ordinary goods" constitute the collateral.[67]

There has been much controversy over the meaning and application of 9-103(4).[68] Among the issues debated are these:[69]

> (1) When subjection (4) provides that it applies "[n]otwithstanding subsections (2) and (3)," does it mean that in any case to which it is applicable, it completely supersedes the perfection rules of subsections (2) and (3), or is it possible to draw on those subdivisions to flesh out subsection (4), as, for

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[63]The subsection refers broadly to "personal property" covered by a certificate of title of the sort described, but it seems unlikely that there would be a certificate-of-title law applicable to anything other than tangible personal property. *See* R. HENSON, SECURED TRANSACTIONS § 9-7, n.42.

[64]*Id.*

[65]Section 9-302(3)(b), (4), which is not concerned with multi-state transactions, has a similar purpose. The official comments offer little explanation of 9-103(4). *But see* 1 G. GILMORE, SECURITY INTERESTS §§ 20.8, 22.7.

[66]*See* text accompanying notes 34 through 36 *supra*, and compare note 37 *supra*, on the meaning of "perfection."

[67]Professor Gilmore has argued, however, that the omission of any reference to "validity" in 9-103(4) is inadvertant, and that the subsection should be read as making the law of the jurisdiction which issued the certificate controlling as to both validity and perfection. 1 G. GILMORE, SECURITY INTERESTS § 10.10, at 327-28.

[68]Recent discussions include R. HENSON, SECURED TRANSACTIONS § 9-7; J. WHITE & R. SUMMERS, U.C.C. § 23-21; Rohner, *Autos, Title Certificates and UCC 9-103: The Draftsmen Try Again*, 27 BUS. LAW. 1177 (1972); Ward, *Interstate Perfection of the Motor Vehicle Security Interest: A Bottleneck in Section 9-103*, 34 ALB. L. REV. 251 (1970).

[69]*See* Rohner, *supra* note 68, at 1182-83.

example, by reading into subsection (4) the 4-month limit on continuance of perfection of subsection (3)?

(2) When is a statute to be regarded as one "which requires indication on a certificate of title of any security interest in the property as a condition of perfection"? Certificate of title acts are of great variety, and not only are many unclear in their own meaning but it is not clear which sorts of title acts subsection (4) refers to.[70]

(3) When subsection (4) speaks of "personal property [which] is covered by a certificate of title . . . . ," does "is" refer to the time when the property is brought into the state, the time when a conflicting claim arises, or possibly some other time? The question can be crucial and has produced conflicting court decisions.[71]

(4) When is property "covered" by a certificate of title? What if application is made for a certificate, but it is not actually issued until after the property has been moved to another state or a conflicting claim has arisen? What if a certificate is issued by a state which had no jurisdiction to control the title to the property? Which certificate "covers" the property if two are outstanding at the same time?[72]

These matters will not be further developed, because in Mississippi the Motor Vehicle Title Law appears to render 9-103(4) largely a dead letter.

d. *The Mississippi Motor Vehicle Title Law.* In Mississippi all three subsections of Section 9-103 of the U.C.C. which have been discussed above are affected by provisions of the Mississippi Motor Vehicle Title Law.[73] This statute was enacted and took effect after the Uniform

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[70]*See* Ward, *supra* note 68, at 253-64. *Compare* J. WHITE & R. SUMMERS, U.C.C. § 23-21, at n.199.

[71]See citations and discussion in Rohner, *supra* note 68, at 1183-86.

[72]See discussion in Rohner, *supra* note 68, at 1186-93.

[73]MISS. CODE ANN. §§ 63-21-1 to -77 (1972). The act appears to be based on the Uniform Motor Vehicle Certificate of Title and Anti-theft Act, approved by the National Conference of Commissioners on Uniform State Laws in 1955. 9B U.L.A. 239-73 (1957). Many of the Mississippi Act's provisions are identical to those of the Uniform Act, but the Mississippi Act does not purport to be an adoption of the Uniform Act, and it departs from the text of the Uniform Act in many respects.

The Uniform Act has not enjoyed wide acceptance, though its popularity seems to be increasing. Connecticut adopted it in 1957 (CONN. GEN. STATS. ANN., Tit. 14, Ch. 247 (1970)) and Vermont in 1969 (VT. STATS. ANN., Tit. 23, §§ 2001 - 2087 (1973 Supp.)). In 1971 the states of Massachusetts, Minnesota, New York, and Rhode Island enacted certificate of title acts apparently modeled after the Uniform Act. MASS. GEN. LAWS ANN., Ch. 90D, §§ 1 - 38 (1972 Supp.); MINN. STATS. ANN., §§ 168A.01 - 168A.31 (1973 Supp.); N.Y.

Commercial Code.[74] Besides the usual boilerplate general repealer of "[a]ll laws or parts of laws in conflict with this act or any part thereof . . . to the extent of such conflict . . . ,"[75] it contains an explicit declaration that, "[e]xcept as provided in section 63-21-53 [which relates to security interests already perfected under Mississippi law at the time the Title Law took effect], the method provided in this chapter of perfecting and giving notice of security interests subject to this chapter is exclusive. Security interests subject to this chapter are hereby exempted from the provisions of law which otherwise require or relate to the filing and recording of instruments creating or evidencing security interests."[76] Thus, the perfection provisions of the Title Law supersede those of the U.C.C.

Section 63-21-43 of the Title Law is captioned, "Perfection of Security Interests,"[77] but it deals also with choice of law governing "validity" of "security interests"[78] in "vehicles"[79] brought into the state. It is pro-

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VEH. & TRAF. LAW §§ 2101-35 (McKinney Supp. 1973); R.I. GEN. LAWS §§ 31-3.1-1 to 31-3.1-38 (1972 Supp.).

[74]Effective from and after passage, August 9, 1968. Ch. 531, § 42 [1968], Miss. Laws 882; MISS. CODE ANN. §§ 63-21-1 *et seq.* (1972) (source notes).

[75]Ch. 531, § 39 [1968] Miss. Laws 881 (Omitted from MISS. CODE ANN. (1972)).

[76]MISS. CODE ANN. § 63-21-55 (1972).

[77]*Id.* § 63-21-43.

[78]"Security interest" is defined as "an interest in a vehicle reserved or created by agreement and which secures payment or performance of an obligation. The term includes the interest of a lessor under a lease intended as security." *Id.* § 63-21-5(q). The definition is close to that of the U.C.C. See 1962 OFFICIAL TEXT WITH COMMENTS §§ 1-201(37), 9-102(2). The Title Law also employs the term "lien," apparently interchangeably with "security interest," though "lien" is separately defined as meaning "every kind of written lease which is substantially equivalent to an installment sale or which provides for a right of purchase; conditional sale; reservation of title; deed of trust; chattel mortgage; trust receipt; and every written agreement or instrument of whatever kind of character whereby an interest other than absolute title is sought to be held or given on a motor vehicle." MISS. CODE ANN. § 63-21-5(f) (1972). "Lienholder" is defined as "any natural person, firm, copartnership, association, or corporation holding a lien as herein defined on a motor vehicle." *Id.* § 63-21-5(g).

This confusion in terminology was avoided in the Uniform Act. "Security interest" is defined there as it is in the Mississippi Law. § 1(k), 9B U.L.A. 242 (1957). "Lien" is not defined. "Lienholder" is defined as "a person holding a security interest in a vehicle." *Id.* § 1(e).

[79]"Vehicle" refers to a vehicle of a type for which the act requires a certificate of title. MISS. CODE ANN. § 63-21-43(1) (1972). With certain exceptions (*e.g.,* dealers' inventories, implements of husbandry, vehicles owned by non-residents and not required to be registered in Mississippi) a certificate of title is required for every "motor vehicle" in the state which is manufactured or assembled after July 1, 1969, or first sold for use after that date; or brought into the state after July 1, 1969, from a state which requires titling; or sold or otherwise transferred by a Mississippi dealer as a used vehicle. MISS. CODE ANN. §§ 63-21-5, -9, -11 (1972). "Motor vehicle" is broadly defined to include "every automobile, motorcycle, mobile trailer, semitrailer, truck, truck tractor, trailer, and other devices in,

vided that, in general, where a vehicle is "subject to a security interest when brought into this state, the validity of the security interest is determined by the law of the jurisdiction where the vehicle was when the security interest attached."[80] However, "[i]f the parties understood at the time the security interest attached that the vehicle would be kept in this state and it was brought into this state within thirty days thereafter for purposes other than transportation through this state, the validity of the security interest in this state is governed by the law of this state."[81] These rules are closely parallel to the first two sentences of Section 9-103(3) of the Code, applicable to "ordinary goods." The term "validity" is not defined by the Title Law and presents the same problem of definition as was discussed above in reviewing the provisions of 9-103(3). If the law of Mississippi governs the "validity" of a security interest in a vehicle brought into the state after the security interest has attached, it appears that, for the most part, the Mississippi U.C.C. and other Mississippi laws will supply the relevant rules of law, for the Title Law has little to say on what is required for "validity."[82]

Since the Title Law makes no exception to the above rules for "mobile goods" of the sort dealt with in U.C.C. Section 9-103(2), it appears to abolish the special rule there stated, insofar as vehicles subject to the Title Law are concerned; *i.e.*, the "validity" of a security interest in "mobile goods" within the scope of the Title Law is *not* to be governed by the law of the jurisdiction where the chief place of business of the debtor is located but by the law of the jurisdiction where the vehicle was located when the security interest attached, or by the law of Mississippi, depending on whether the parties contemplated early removal to Mississippi and such removal occurred.[83]

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upon, or by which any person or property is or may be transported or drawn upon a public highway which is required to have a road or bridge privilege license, except such as is moved by animal power or used exclusively upon stationary rails or tracks." *Id.* § 63-21-5(j).

[80]*Id.* § 63-21-43(3).

[81]*Id.* § 63-21-43(3)(a).

[82]The Title Law may imply that only security interests created by *written* agreement are to be recognized. The term "lien" is defined in terms of writings. See note 78 *supra*. The definition of "security interest" refers to "agreement" without specifying that the agreement must be in writing (see note 78 *supra*), but section 63-21-5(p) defines "security agreement" as "a written agreement which reserves or creates a security interest." MISS. CODE ANN. § 63-21-5(p) (1972). The difference from the U.C.C. is not great but could in an odd case be crucial. Under the Code, a security agreement is unenforceable against either the debtor or third parties unless the debtor has signed a security agreement or the secured party has possession of the collateral. UNIFORM COMMERCIAL CODE § 9-203(1).

[83]These "validity" provisions are identical with those of the Uniform Act, Section 20(c), (c) (1). 9B U.L.A. 253 (1957). Although the same provisions were originally enacted as part of the Connecticut version of the Uniform Act (CONN. GEN. STATS. ANN., § 14-185

As to "perfection," Section 63-21-43(3)(b) of the Title Law provides:

> If the security interest was perfected under the law of the jurisdiction where the vehicle was when the security interest attached, the following rules apply:
>
> (i) If the name of the lienholder is shown on an existing certificate of title issued by that jurisdiction his security interest continues perfected in this state.
>
> (ii) If the name of the lienholder is not shown on an existing certificate of title issued by that jurisdiction the security interest continues perfected in this state for four months after a first certificate of title of the vehicle is issued in this state, and also thereafter if within the four-month period it is perfected in this state. The security interest may also be perfected in this state after the expiration of the four-month period; in which case perfection dates from the time of perfection in this state.[84]

First, it should be observed that as to vehicles subject to the Title Law, the "mobile goods" provisions of Section 9-103(2) of the Code will be inoperative with respect to questions of perfection of security interests as well as with regard to their validity. The Title Law gives recognition to perfection achieved under the law of another jurisdiction only if that jurisdiction was the location of the vehicle at the time of attachment of the security interest. The law of the jurisdiction where the debtor's chief place of business is (or was) located is not material unless it also happened to be the location of the vehicle.

Second, a parallel between these provisions and subsections (3) and (4) of Code Section 9-103 is observable, but there are significant differences, too. Among the similarities are that Section 63-21-43(3)(b)(ii) of the Title Law indicates a willingness to defer to the certificate of title acts of other states, as does 9-103(4) of the U.C.C.; Title Law Section 63-21-43(3)(b)(i) provides for a limited continuance of perfection achieved in another state but requires compliance with Mississippi

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(1970)) (Historical Note), the 1961 amendments substituted a provision incorporating section 9-103, subsections (2), (3) and (4), of the 1962 U.C.C. by reference. CONN. GEN. STATS. ANN., § 14-185(d) (1970). The Massachusetts title act also departs from the text of the Uniform Act on this point, referring to section 9-103 of the state's U.C.C. for the applicable rules. MASS. GEN. LAWS ANN., Ch. 90D, § 21 (1972 Supp.). The title acts of Minnesota, New York, Rhode Island, and Vermont follow the text of the Uniform Act. MINN. STATS. ANN. § 168A.17, Subdiv. 3 (1973 Supp.); N.Y. Veh. & Traf. Law § 2118(c) (McKinney Supp. 1973); R.I. Gen. Laws § 31-3.1-19(c) (1972 Supp.); Vt. Stat. Ann. Tit. 23, § 2042(c) (1973 Supp.).

[84]MISS. CODE ANN. § 63-21-43(3)(b) (1972).

perfection procedure to continue the perfection beyond that time, as does 9-103(3) of the Code; and the Title Law appears to allow "perfection" to be governed by the law of a foreign state even if the "validity" of the security interest is governed by Mississippi law, as 9-103(3) of the Code arguably does.[85]

An apparent *difference* is that the Title Law makes listing of the name of the secured party on a foreign certificate of title effective to continue perfection in Mississippi indefinitely (at least, without stated time limit) without qualification based on the nature of the certificate of title law under which the certificate was issued, whereas Section 9-103(4) of the U.C.C. is limited to certificates issued under laws which make "indication on a certificate of title of any security interest in the property . . . a condition of perfection . . . ."[86] Under the title acts of some states listing of security interests on the certificate of title is not mandatory, as to some or all security interests; under some title acts, whatever must be shown on the certificate of title, perfection of security interests is not dependent on listing on the certificate but is achieved by filing an application for title or in some other way.[87] The Title Law appears to treat a certificate issued under *any* certificate of title act effective for continuance of perfection in Mississippi, provided only that the name of the secured party actually appears on the certificate.

It would be possible to read section 63-21-43(3)(b)(i) as limited to cases where the perfection of the security interest *was achieved by* indication of the name of the lienholder on the certificate; *i.e.*, where under the law of the jurisdiction where the security interest was perfected indication on the certificate of title of the security interest was a condition of perfection. That would bring paragraph (i) into closer conformity to 9-103(4) of the U.C.C. However, it would raise another question: what law governs perfection where a vehicle is brought into the state subject to a security interest perfected otherwise than by listing on a certificate of title, yet the name of the lienholder is in fact shown on a certificate of title? Paragraph (ii) provides rules for cases where "the name of the lienholder is not shown on an existing certificate of title . . . ." To avoid the conclusion that the Title Law leaves the situation in limbo, it would be necessary to read something into paragraph (ii). It might be read as applying "if the name of the lienholder is not shown on an existing certificate of title issued by that jurisdiction *under a statute which requires such listing as a condition of perfection.*" This would bring the Title Law into fairly close conformity to Section 9-103(4) of the Code. If there is a certificate of title covering the vehicle

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[85]See discussion in text accompanying notes 39 & 40 *supra*.

[86]1962 OFFICIAL TEXT WITH COMMENTS § 9-103(4).

[87]See 1 G. GILMORE, SECURITY INTERESTS § 10.10, text following n.3.

when it is brought into the state, *and* if the certificate of title act under which the certificate was issued required indication of the security interest on the certificate as a condition of perfection, *and* if the name of the lienholder appears on the certificate, both section 63-21-43(3)(b)(i) of the Title Law and Section 9-103(4) of the Code would probably operate to continue the perfected status of the security interest in Mississippi indefinitely. If there is a certificate of title covering the vehicle, which was issued under a statute requiring that the security interest be shown on the certificate as a condition of perfection, and the name of the lienholder does *not* appear on the certificate, neither act would treat the security interest as perfected in Mississippi. On the other hand, if the security interest was perfected in another jurisdiction by a method other than by indication of the interest on a certificate of title, whether or not a certificate existed and whether or not the name of the secured party appeared on the certificate, Section 9-103(4) of the Code would not apply at all, and the Title Law would attach no importance to the certificate insofar as the perfected status of the security interest is concerned.

It is difficult to believe, however, that either paragraph (i) or paragraph (ii) of Section 63-21-45(3)(b) of the Title Law, when it refers to "a certificate of title," is intended to be limited to a certificate issued under a statute requiring that a security interest be shown on the certificate in order to be perfected. No other provision of the act refers to such a distinction, and the Title Law itself is apparently not that type of statute, as will be demonstrated below.

Another notable difference between the U.C.C. rules and those of the Title Law appears in cases where paragraph (ii) of Section 63-21-45(3)(b) of the Title Law *is* applicable. In such cases it is provided that perfection achieved in the jurisdiction where the security interest attached continues automatically in Mississippi for a period of 4 months "after a first certificate of title of the vehicle is issued in this state," whereas Section 9-103(3) of the Code would continue perfection in "this state" for 4 months from the time the property is brought into the state. Since a first certificate of title is unlikely to be issued in Mississippi for some time after the vehicle is brought into the state, it is evident that the Title Law provides for a longer period of automatically continued perfection than does the comparable rule of the Code.

Just how long it extends the period is conjectural, however. It may, perhaps, be thought reasonable to infer that the 4 months begins to run from the issue of a first certificate of title in Mississippi, *provided* application for a first certificate of title has been timely made, but that reading would be difficult to apply because the only provision in the Act dealing with when application for a certificate of title must be made and which refers to the time the vehicle is brought into the state is section

63-21-9(a): "any person bringing a motor vehicle into this state *from a state which requires titling* shall make application for [Mississippi] title . . . within 30 days thereafter." (Emphasis supplied.) Moreover, adoption of that interpretation simply raises the further question: If application for title is unduly delayed or not made at all, what rule applies as to the continuance of the perfected status of the security interest in Mississippi?

In *In re Partain*, the one reported case considering the Title Law's 4-month rule,[88] the secured party argued unsuccessfully for a literal application of section 63-21-43(3)(b)(ii). Partain bought a 1970 model automobile in Alabama in June 1970, under a conditional sales contract which was assigned by the seller to General Motors Acceptance Corporation. Alabama had no certificate of title law, and the security interest was perfected by filing in Alabama under its Uniform Commercial Code. Within a month after the purchase Partain moved to Mississippi, with the car. GMAC was informed of the move by August 1970, and in fact transferred Partain's account to one of its Mississippi offices, but neither Partain nor anyone else ever applied for a Mississippi certificate of title and GMAC took no other steps in Mississippi to perfect its security interest. In March 1972, Partain filed a petition in bankruptcy. GMAC claimed the car by virtue of its security interest, but the referee ruled in favor of the trustee in bankruptcy, on the ground that GMAC's security interest was unperfected on the date of the bankruptcy petition and the trustee's rights were therefore superior to those of GMAC.

On review of the referee's decision in the District Court for the Northern District of Mississippi, GMAC contended that since the Title Law provides that where a vehicle is brought into the state subject to a security interest perfected elsewhere but the name of the lienholder does not appear on an existing certificate of title issued by the jurisdiction of attachment, the security interest continues perfected in Mississippi for 4 months after a first certificate of title is issued in Mississippi, the operation of that provision in a case where no first certificate of title has ever been issued in Mississippi must be to continue the perfected status of the security interest in Mississippi indefinitely. District Judge Smith, however, could not accept that reading. He concluded, as apparently had the referee, that Section 63-21-43(3)(b)(ii) of the Title Law was intended to apply only to a case where, when a vehicle is brought into Mississippi, it is already covered by a certificate of title issued by the state where the security interest was perfected, which certificate fails to show the name of the secured party, and that the Title Law is simply silent on the question of continuance of perfection of a security interest perfected in a non-title state. He further ruled that since the Title Law

[88] *In re* Partain, 351 F. Supp. 750 (N.D. Miss. 1972).

did not deal with the question presented by the facts of this case, the Mississippi U.C.C. should be resorted to to fill the gap, the applicable provision being that of 9-103(3), that the security interest remains perfected in Mississippi for 4 months after the property is brought into the state and then ceases to be perfected unless the steps prescribed by Mississippi law for perfection of security interests are taken within that period. As GMAC did not take such steps, its security interest ceased to be perfected 4 months after the vehicle was brought into Mississippi and was unperfected at the time of bankruptcy.

The decision achieves a neat solution to a thorny problem, but it may be challenged on the ground that the Title Law is intended to provide a complete body of law governing perfection of security interests in motor vehicles for which the Act requires certificates of title. Section 63-21-55, quoted above,[89] appears to mean that, and the intent is emphasized by section 63-21-43(1):[90] "Unless excepted by Section 63-21-41, a security interest in a vehicle of a type [for] which a certificate of title is required is not valid against creditors of the owner or subsequent transferees or lienholders of the vehicle unless perfected as provided in this chapter." (The exceptions made by section 63-21-41[91] are quite limited: liens given by statute to the United States, the State of Mississippi, or political subdivisions of Mississippi; liens given by statute or rule of law to suppliers of services or materials; and security interests in vehicles created by manufacturers or dealers holding the vehicles for sale.)

If the holding of the *Partain* case is accepted, the problem remains of how the 4-month rule of the Title Law works when a vehicle is brought into Mississippi subject to an already perfected security interest and covered by a certificate of title but one which does not show the name of the lienholder, and a first certificate of title is not applied for within the 30-day period allowed by section 63-21-9(a).[92] Does the 4-month period begin to run from the time a certificate of title would have been issued if timely application had been made? If so, how is it to be determined how soon such a certificate would have been issued after application was made? If not, is the perfection of the security interest in Mississippi automatically continued until a first certificate of title is actually issued (and 4 months thereafter), no matter how long delayed such

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[89]Text at note 76 *supra*.

[90]MISS. CODE ANN. § 63-21-43(1) (1972).

[91]*Id.* § 63-21-41.

[92]*Id.* § 63-21-9(a): "[A]ny person bringing a motor vehicle into this state from a state which requires titling shall make application for title to the comptroller within thirty days thereafter." This question would arise only if the certificate was issued under a "non-exclusive" title act, *i.e.*, one not requiring that the security interest be shown on the certificate of title as a condition of perfection.

issuance may be? It is difficult to forsee how such questions will be resolved.[93]

In the event that perfection is lost under section 63-21-43(3)(b)(ii), by reason of the expiration of the 4 months after a first certificate of title is issued in Mississippi without the secured party having reperfected in Mississippi by one of the methods provided by the Act, the Title Law is as silent as the U.C.C. on the question whether the loss of perfection is to be treated as retroactive in favor of persons who acquired conflicting interests in the vehicle between the time that it was brought into the state and the expiration of the 4-month period.[94]

The Mississippi Title Law also raises some interesting questions regarding the status of security interests in motor vehicles which are perfected *in* Mississippi in accordance with the Title Law, when the vehicles are taken into other Code states. The Title Law calls for the listing on a certificate of title issued by the Motor Vehicle Comptroller of the names and addresses of the *first two* lienholders in the order of priority shown on the application or previous certificate submitted with the application.[95] Presumably the Comptroller could, if he chose, adopt a practice of listing all security interests of which he has notice, for the Act permits the Comptroller to include on a certificate "Any other data the comptroller prescribes."[96] However, listing on an issued certificate of title is not *required* for perfection of *any* security interest. The Act provides two methods of perfection:

> (1) Section 63-21-43(2) provides: "A security interest is perfected by the delivery to the comptroller of the existing certificate of title, if any, an application for a certificate of title containing

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[93]The "perfection" provisions discussed above are also taken almost verbatim from the Uniform Act, section 20(c)(2). 9B U.L.A. 253-54 (1957). The Connecticut amendments of 1961 to its version of the Uniform Act abandoned these provisions in favor of adoption by reference of subsections (2), (3) and (4) of Section 9-103 of the 1962 U.C.C. CONN. GEN. STATS. ANN., § 14-185(d) (1970). The Massachusetts Title Act incorporates the rules of U.C.C. section 9-103 by reference, with the exception of a provision that if a vehicle is subject to an already perfected security interest when brought into the state but the vehicle is not covered by a certificate of title issued under a statute which requires indication of the security interest on the certificate as a condition of perfection, the security interest continues perfected in Massachusetts for 4 months after a first certificate of title is issued there, and also thereafter if, within the 4-month period, it is perfected in Massachusetts. MASS. GEN. LAWS ANN., Ch. 90D, § 21 (1972 Supp.). The laws of Minnesota, New York, Rhode Island and Vermont follow the text of the Uniform Act closely. MINN. STATS. ANN., § 168A.17, Subdiv. 3 (1973 Supp.); N.Y. VEH. & TRAF. LAW § 2118(c) (McKinney Supp. 1973); R.I. GEN. LAWS § 31-3.1-19(c) (1972 Supp.); VT. STAT. ANN., Tit. 23, § 2042(c) (1973 Supp.).

[94]Compare text at note 42 *supra*.

[95]MISS. CODE ANN. § 63-21-19(1)(c) (1972).

[96]*Id.* § 63-21-19(1)(f).

the name and address of the lienholder and the date of his security agreement, a copy of the security interest document, and the required fee."[97]

(2) An alternative procedure is provided for cases where vehicles are brought into the state subject to security interests and the secured parties wish to perfect in Mississippi. Such a secured party may, according to section 63-21-43(3)(d), either proceed under subsection (2) or perfect by "delivering to a county tax collector or a designated agent a notice of security interest in the form the comptroller prescribes together with documents to support the security interest as required by the comptroller and the required fee."[98]

It is "delivery to the comptroller" of application for title or "delivering to a county tax collector or designated agent" of notice of the security interest that perfects a security interest in a motor vehicle, not indication of the security interest on a certificate of title.

Assume that a security interest has been perfected in Mississippi under the Title Law in one of these ways, and the vehicle is then taken to another state to remain there indefinitely. Assume that the 1962 Official Text of the Code is in force there and not overridden by any other statute of that state. What is the status of the security interest in that state? It does not appear that section 9-103(4) would operate to give the security interest a continued perfection there, even if the name of the secured party appears on a Mississippi certificate of title covering the vehicle, for subsection (4) makes the law of the state which issued a certificate of title controlling only if the certificate of title law "requires indication on a certificate of title of any security interest in the property as a condition of perfection," and the Mississippi Title Law does not so require.[99] It follows that the perfected status of the security interest in the other state will be governed by subsection (2) or subsection (3) of section 9-103 of that state's Code. If the vehicle is "mobile goods," the security interest will be unperfected in the other state, unless Mississippi happens to be the state in which the debtor's chief place of business is located, until the secured party perfects under the law of the

[97] *Id.* § 63-21-43(2).

[98] *Id.* § 63-21-43(3) (d).

[99] *See* Ward, *supra* note 68, at 257-64. *But see* J. WHITE & R. SUMMERS, U.C.C. § 23-21, at n.199. In some states U.C.C. Section 9-302(4) would arguably promote a certificate of title law of the same state which did not require listing on the certificate of title of all security interests as a condition of perfection but which permitted such listing into an act requiring such listing as a condition of perfection, provided the state has also adopted Alternative Version B. of section 9-302(3)(b); if that is so, the title law may therefore qualify under section 9-103(4). 1 G. GILMORE, SECURITY INTERESTS § 10.10, text at n.4. But that cannot be so of the Mississippi Title Law because (1) Mississippi has adopted Alternative A of section 9-302(3)(b) of the Code, and (2) in any event, the perfection provisions of the Title Law supersede those of the Code.

debtor's chief place of business.[100] If the vehicle is "ordinary goods," the perfected status of the security interest will continue in that state under 9-103(3) for 4 months, then become unperfected unless the secured party reperfects under the law of that state.

If the foregoing analysis is correct, we may have the anomaly of Mississippi law giving to foreign certificates of title a greater effectiveness in perfecting security interest in vehicles brought into Mississippi than the law of most other states would accord to a Mississippi certificate of title, and the anomaly is exaggerated if Section 63-21-43(3)(b)(i) of the Title Law is given a literal reading, so as to treat any secured party whose name is listed on a certificate of title as having a permanently perfected security interest in Mississippi, without regard to the nature of the certificate of title act under which the certificate was issued.[101]

This has not been an exhaustive survey of the problems of interpretation and application arising from Mississippi's Motor Vehicle Title Law, but it goes far enough, it is believed, to demonstrate that the Title Law not only sets up different rules for determining the status of security interests in vehicles brought into the state after creation of such security interests than does the U.C.C., but also leaves much doubt about how those rules are intended to work.

2. Intangibles

Personal property other than goods is dealt with in Article 9 through a complex six-fold classification. Three of the classes are what might be termed "semi-tangible" personal property, in that, although the collateral itself is not tangible property, the rights which form the collateral are evidenced by writings which, in common practice, are considered so intimately connected with the rights that the writings are normally delivered to the transferees when transfer of the rights is intended, and which, if pledged, are normally treated by the law as effective to create security interests in the rights they represent which cannot be defeated by subsequent transfers by the pledgors.[102] The "semi-tangibles" are referred to in the Code as "instruments,"[103] "documents,"[104] and "chat-

[100] 1962 OFFICIAL TEXT WITH COMMENTS § 9-103(2).

[101] See text following note 85 *supra*.

[102] *See* 1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 2; 1 G. GILMORE, SECURITY INTERESTS § 12.5.

[103] " 'Instrument' means a negotiable instrument (defined in section 3-104), or a security (defined in section 8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment." 1962 OFFICIAL TEXT WITH COMMENTS § 9-105(1)(g).

[104] " 'Document' means document of title as defined in the general definitions of Arti-

tel paper."[105]

What might be termed "pure intangibles" are rights not evidenced by writings so intimately connected with the rights and which are not usually treated in law as pledgeable.[106] They are referred to in the Code as "accounts,"[107] "contract rights,"[108] and "general intangibles."[109]

Section 9-103 contains rules for determining the law applicable to

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cle 1 (Section 1-201)." *Id.* § 9-105 (1)(e). Bills of lading and warehouse receipts are typical. *See Id.* § 1.201(15).

[105]" 'Chattel paper' means a writing or writings which evidence both a monetary obligation and a security interest in or lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper." *Id.* § 9-105(1)(b). Typical examples are conditional sales contracts and chattel mortgages. *Id.* § 9-308, Comment 1. A negotiable note given with a chattel mortgage or other security agreement is treated as part of the chattel paper. *See id.* § 9-105, Comment 4.

An official amendment to section 9-105, approved in 1966 for optional adoption, excluded from the definition of "chattel paper" a "charter or other contract involving the use of a vessel . . . ." PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT No. 3, at 15 (1967). The exclusion does not appear in Mississippi's U.C.C.

[106]*See* 1 G. GILMORE, SECURITY INTERESTS § 12.5, at 377.

[107]" 'Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper." 1962 OFFICIAL TEXT WITH COMMENTS, § 9-106. The reference is primarily to rights which, in commercial practice, are referred to as "accounts receivable," rights to payment for goods or services which have been earned by performance. *Id.* at Comment. However, it should be noted that the term "accounts" does not include all rights which businessmen are likely to treat as "accounts receivable," such as money due in repayment of a loan or royalties due for use of a patent or copyright. See 48 ALI PROCEEDINGS 274 (1971) (remarks of Justice Robert Braucher, one of the Reporters for the Article 9 Review Committee).

[108]" 'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper." 1962 OFFICIAL TEXT WITH COMMENTS § 9-106. The intent of the draftsmen appears to have been to limit this term to contracts for the sale or lease of goods or for the rendition of services, for the official comment to section 9-106 says: "Contract rights may be regarded as potential accounts: they become accounts as performance is made under the contract." However, the Code text does not express such a limitation; it could, for example, be applied to a right to payment for land arising from a contract for sale prior to conveyance of the property.

[109]" 'General intangibles' means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents and instruments." *Id.* Goodwill, literary rights, copyrights, trademarks, and patents are examples. *Id.* at Comment. However, since "general intangibles" is a catch-all category, including all personal property not within the definitions of the other classes of personal property, it is open-ended and could conceivably include property of the "semi-tangible" variety, or even tangibles which a court concluded did not fit the definition of "goods."

An optional amendment to section 9-106, approved by the Permanent Editorial Board in 1966, would classify rights arising from a charter or other contract for use of a vessel, whether earned or unearned, as "contract rights," rather than "accounts" or "general intangibles." PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT No. 3, at 18 (1967). The Mississippi U.C.C. does not include this provision.

An interesting question arising under the 1962 Official Text is the classification of

validity and perfection of security interests in the "pure intangibles." It is not clear whether it deals with the "semi-tangibles" at all.

a. *Pure Intangibles.* The problem with "pure intangibles" is not one of movement of the collateral from state to state but of locating it in any state at all, for purposes of determining the applicable law.[110] Section 9-103 deals differently with general intangibles than it does with accounts and contract rights.

(1) *Accounts and Contract Rights.* Two subsections, (1) and (5), are concerned with accounts and contract rights. The general rule, laid down by subsection (1), is that the validity and perfection of security interests in such collateral are governed by Article 9 of "this state" if "the office where the assignor . . . keeps his records concerning them is in this state"; if not, then they are governed "by the law (including the conflict of laws rules) of the jurisdiction where such office is located."[111]

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collateral into which money falls. "Money" is defined in section 1-201(24) as "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency." It is expressly recognized in section 9-306(1) as property in which there can be a Code security interest when it constitutes proceeds of original collateral or its proceeds. Moreover, it presumably could be original collateral itself, under the general provision of section 9-102(1)(a) that, "this Article applies . . . to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures . . . ." However, the definition of "goods" in section 9-105(1)(f) expressly excludes "money" from the category, and it could not be fitted into the definitions of "document," "chattel paper," "account" or "contract right." It might sometimes come within the definition of "instrument" but not always, for section 9-105(1)(g) requires that an "instrument" (other than an Article 3 negotiable instrument or an Article 8 investment security) take the form of a "writing which evidences a right to the payment of money" and which has certain other characteristics. If money does not qualify as an "instrument" or "instruments," it must be "general intangibles," the catch-all term (§ 9-106). It would follow that the only way to perfect a security interest in such money would be to file a financing statement (§ 9-302(1)), and choice of law would be controlled by section 9-103(2), the law of the jurisdiction where the chief place of business of the debtor was located.

Doubtless, the idea that money could not be pledged, and that a security interest in money could be perfected by filing in the jurisdiction where the debtor had his chief place of business, regardless of the location of the money, would be shocking to many. *See* REVIEW COMMITTEE FOR FINAL REPORT 213, item E-3 (1971). At least one case decided under the 1962 Official Text has held that coins with numismatic value may be pledged, and that a financing statement need not be filed to perfect the pledgee's security interest, on the reasoning that coins treated as part of a coin dealer's inventory are "goods" under Article 9, the express exclusion of "money" from the definition of "goods" in section 9-105(1)(f) being limited to money when it is used as a medium of exchange. Zuke v. St. Johns Community Bank, 387 F.2d 118 (8th Cir. 1968), *aff'g In re* Midas Coin Co., 264 F. Supp. 193 (E.D. Mo. 1967).

[110]J. WHITE & R. SUMMERS, U.C.C. § 23-20.

[111]In this subsection, as in subsection (2), there is a curious difference in wording, to the effect that "this state's" *Article 9* applies if the records are kept in "this state," whereas if the records are kept in another jurisdiction, then "the [whole?] law" of that jurisdiction governs. See note 51, *supra*.

Again, the ambiguity of the word "is" crops up. If the office where the assignor kept his records concerning the accounts or contract rights constituting the collateral were to change to another (Code) state after perfection of the assignee's security interest had been achieved by filing under the law of the original jurisdiction, the security interest may or may not be deemed to have become unperfected, so as to make refiling necessary in the second jurisdiction to reinstate it, and that without any period of grace to give the secured party time to learn of the change and make his new filing.[112] The Comments take the position that a new filing is necessary,[113] but the Code text is no clearer than it is in the "mobile goods" situation.

The reasoning behind selection of the place where the assignor keeps his records concerning accounts and contract rights as the place whose law should govern security interests in them is explained thus in the Comments:[114] One of the principal questions that needs to be settled is where financing statements should be filed to perfect security interests in such intangible collateral; since the purpose of requiring filing is to enable future creditors of the debtor-assignor to find out what security interests he has created, the place chosen must be one creditors would normally associate with the assignor; since the effectiveness of security interests against such creditors is usually dependent on proper filing, the secured party must have a sure guide to where to file; in most cases the test of the place where the debtor-assignor keeps his records concerning the collateral will satisfy both objectives. The Comments concede that difficulty may arise in cases of multi-state enterprises — selection of the proper state in which to file may be difficult for the assignees since, if the debtor keeps records of accounts and contract rights in different states, it will be the internal practice of the assignor that determines what law applies to particular accounts and contract rights — but the draftsmen assert that "neither this nor any other statutory formula can settle in advance beyond the possibility of a doubt" the proper place of filing for every case. The comfort is offered that the assignee can, when in doubt, file in all states where it might be claimed that the assignor keeps his records concerning the accounts or contract rights assigned.[115] Presumably, the assignor's future creditors have a similar opportunity to search the records of all states in which it may be claimed the records are.

Besides the uncertainty of the rule, it has been criticized as un-

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[112]See the discussion of the similar problem with respect to "mobile goods" at the text following note 56 *supra*.

[113]1962 Official Text with Comments § 9-103, Comment 2.

[114]*Id.*

[115]*Id.*

sound in application because of the increasing practice of using off-premises computers to maintain business records; records concerning accounts and contract rights may be kept in the electronic memory of a machine located in a state in which the debtor has no business office at all, and future creditors are unlikely to think to search the public records there.[116] Furthermore, the rule may be unworkable, as in a case where a sale of accounts is made on a "without recourse" basis, and the debtor-assignor retains no records concerning the assigned accounts.[117]

Subsection (5) of section 9-103 is an optional subsection dealing specially with cases where the assignor's office where records are kept concerning accounts or contract rights collateral is outside the United States. If the transaction is found to bear "an appropriate relation to this state," then "this state's" Article 9 governs validity and perfection of a security interest in such accounts or contract rights, but the only way to perfect is "by notification to the account debtor." The Comments explain that this rule is designed to alleviate the problem of ascertaining the law of a foreign nation if the general rule of 9-103(1) would make such law controlling.[118] The special rule as to method of perfection is not explained in the Comments and is difficult to account for.[119] Subsection (5) does not appear in the Mississippi U.C.C.

(2) *General Intangibles.* Subsection (2) of section 9-103 specifies the law applicable to validity and perfection of security interests in general intangibles and applies to them the same rules that apply to "mobile goods"; *i.e.,* basically, the law of the debtor's "chief place of business" applies. What has been said above,[120] in discussion of these rules in relation to "mobile goods," is, for the most part, equally applicable where the collateral is general intangibles.

The omission of general intangibles from subsection (1)'s place-where-records-are-kept rule and selection of the debtor's chief place of business as the touchstone to the applicable law is explained in the Comments on the ground that "general intangibles are not closely associated with particular records."[121] However, that would not always be true, given the broad scope of the term "general intangibles,"[122] and in any event the close relation between accounts, contract rights and gen-

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[116]*See* P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 3A.06, text at n.164 (1973); 1 G. GILMORE, SECURITY TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 10.9, text at n.10 (1965).

[117]*See* COOGAN, HOGAN & VAGTS, *supra* note 116, at § 3A.06 n.164.

[118]1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 8.

[119]*See* 1 G. GILMORE, SECURITY INTERESTS § 10.11.

[120]*See* part II. *A.* 1. b., beginning at note 49 *supra.*

[121]1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 2, and see Comment 5 to the same section.

[122]See note 109 *supra.*

eral intangibles poses problems for both secured parties trying to determine where to file and record researchers trying to decide where to search.

First, there is the difficulty of determining in some cases into which class a particular intangible falls. Suppose an author enters into a contract with a publisher for publication of his book, with royalties to be payable as sales of the book are made. When publication occurs is the author's right to royalties on sales which have not yet been made an account, a contract right, or a general intangible?[123]

Second, suppose the right is treated as a contract right, and the author makes an assignment of his right as security for loan. The appropriate state in which to file a financing statement as to the collateral is, according to subsection (1), the state in which the debtor keeps his records concerning the right. Assume that the secured party files there. Now some royalties become payable by reason of sales of the book. Does the secured party have a perfected security interest in the right to these royalties? The right has now become either an account or a general intangible. If it is an account, the secured party's original filing will probably protect him if it described the collateral as including accounts or if it claimed proceeds.[124] However, if the right to such royalties is

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[123] "'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper." 1962 OFFICIAL TEXT WITH COMMENTS § 9-106. If the author has done all he is called upon to do by the terms of the contract with the publisher, hasn't he earned his royalties by performance, even though his right to payments is conditioned on events outside his control? If so, is his right an "account"? "'Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper." *Id.* Are the royalties "payment for services rendered," or are they more in the nature of compensation for the use of ideas? If the right is neither a "contract right" or an "account," it is presumably a "general intangible."

[124] If the description in the financing statement describes the collateral as including accounts, it will serve to perfect the security interest in subsequently arising accounts (UNIFORM COMMERCIAL CODE §§ 9-303(1), 9-402(1)) of the same debtor, at least if the place where he keeps his records concerning them is in the same state, as is likely to be true in the case supposed, for section 9-103(1) makes that state's law controlling as to perfection of security interests in both contract rights and accounts. If the financing statement claims proceeds, that will also protect the secured party, for section 9-306(1) defines as "proceeds" an "account arising when the right to payment is earned under a contract right"; section 9-306(2) gives the secured party a security interest in proceeds of the original collateral; and section 9-306(3) provides that a perfected security interest in original collateral is a perfected interest as to proceeds for at least 10 days, and continues beyond the 10-day limit if "a filed financing statement covering the original collateral also covers proceeds." Since the law of the state where the debtor maintains his records concerning accounts and contract rights governs perfection of security interests in such collateral (§ 9-103(1)) and that state is the state in which the secured party filed, that state's section 9-306 will operate in his favor, provided the debtor's records concerning both the account and the contract right are kept there.

treated as having become a general intangible, then because subsection (2) provides that the law of the debtor's chief place of business governs perfection of security interests in general intangibles, if the author's "chief place of business" (whatever that means in this context) were in a different state from the one in which he kept his records concerning his royalty rights, the secured party may be without a perfected security interest unless and until he makes a new filing in that state.[125] The advice can be given to the secured party to file in both states when dealing with collateral so difficult to classify,[126] but secured parties (and record searchers) may not appreciate the subtle distinctions involved.

b. *Semi-tangibles.* The "semi-tangibles" — instruments, documents, and chattel paper — may not be covered by section 9-103 at all. They are not explicitly referred to anywhere in the section. Subsection (3) refers to "personal property other than that governed by subsections (1) and (2)," and the term "personal property" would, of course, be broad enough to include all of the "semi-tangibles" (especially in view of the fact that section 9-102(1), in defining the scope of Article 9, speaks of "personal property or fixtures including . . . documents, instruments, . . . chattel paper . . . ."). However, the caption to section 9-103 defines the scope of the *section* as, "Accounts, Contract Rights, General Intangibles and Equipment Relating to Another Jurisdiction; and Incoming Goods Already Subject to a Security Interest," and section 1-109 declares that, "Section captions are part of this Act." It would appear that the specific limitation to "goods" coming into the state already subject to a security interest in the caption to the section has the effect of limiting the generality of "personal property" in subsection (3) to goods. The Comments seem to assume that section 9-103 is not applicable to instruments, documents, and chattel paper.[127]

If section 9-103 has no application to the semi-tangibles, the choice-of-law rule that does apply must be that of section 9-102.[128] (The ambiguity of that rule has been noted earlier.[129]) It may cause little practical

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[125]An argument could be made that the secured party is protected by the proceeds rules of section 9-306 because the section makes no distinction between cases where the original filing is in a state appropriate for filing as to contract rights collateral but not appropriate for filing as to general intangibles and cases where the original filing is in a state appropriate for both types of collateral. *See* R. HENSON, SECURED TRANSACTIONS § 9-2, text at n.11. However, section 9-306 does not appear to be intended to govern conflict of laws problems; rather, it seems to assume that the law of the enacting state applies to questions of perfection of the security interest as to both the original collateral and the proceeds. Section 9-103 answers the question whether this is so or not.

[126]*See* 1 G. GILMORE, SECURITY INTERESTS § 12.6, text at n.4.

[127]*See* 1962 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 2. *But see* R. HENSON, SECURED TRANSACTIONS § 9-1, at 206-07.

[128]*See* Official Comment cited note 127 *supra.*

[129]*See* text at note 31 *supra.*

difficulty with respect to instruments, since the choice-of-law problem most often arises in connection with the question of the proper place to file to perfect a security interest, and a security interest in instruments (other than those forming part of chattel paper) cannot be perfected by filing but only by taking possession,[130] save for certain situations where temporary perfection can be had without either filing or possession.[131] However, filing is an available method of perfection as to chattel paper and negotiable documents,[132] and the problem of where to file could be critical. The 1962 Official Text of the Code leaves some loose ends here.

B. The 1972 *Official Text*

The new revision of the U.C.C. changes sections 1-105 and 9-102 and completely overhauls 9-103. A basic departure from the 1962 Official Text reflects a decision to limit special choice-of-law rules for secured transactions to issues concerning perfection of security interests and to relegate all other questions to the Code's general conflicts rules in section 1-105. Accordingly, section 9-102 has been revised to eliminate the statement that Article 9 applies "so far as concerns any personal property and fixtures within the jurisdiction of this state"; the rules of section 9-103 are limited to questions of what law governs "perfection and the effect of perfection or non-perfection of a security interest" in specified types of collateral; and section 1-105(2) is modified to exempt from the operation of subsection (1), insofar as secured transactions are concerned, only cases governed by the "Perfection provisions of the Article on Secured Transactions, Section 9-103."

These changes have two principal effects: (1) the door is opened for the parties to a secured transaction to select the law that will govern their transaction to some extent, and (2) if the parties have not made an effective choice of the governing law, the Code largely abdicates the effort to provide definite rules and leaves the choice of law to imprecise standards which may vary from state to state.

How far choice of law for secured transactions is governed by section 1-105(1) depends, of course, on what is comprehended by the words "perfection and the effect of perfection or non-perfection of a security interest" in section 9-103. Certainly the rules most directly devoted to how perfection may be achieved, at what moment it occurs, how long it lasts, and how and when it is lost are governed by section 9-103, rather than 1-105, as to the types of collateral within the coverage of 9-103. Rules of priority as between the secured party and rival third-party

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[130] 1962 OFFICIAL TEXT WITH COMMENTS § 9-304(1).

[131] *Id.* § 9-304(4), (5)(b).

[132] *Id.* § 9-304(1).

claimants to the collateral would also be governed by section 9-103, to the extent that priority would be affected by the perfected or unperfected status of the security interest. But the interdependent character of Article 9's rules raises a question of how much further the reach of 9-103 extends. For example, the rules governing foreclosure of security interests in Part 5 of Article 9 (captioned "Default") do not mention perfection, but the operation of some of them would depend on whether another security interest in the same collateral is subordinate to that of the foreclosing party,[133] and that, in turn, would often depend on the rules which deal directly with perfection and priorities; does that subject choice of law as to some or all of the default rules to the directions of section 9-103? It might even be argued that choice of law as to how security interests may be created and become enforceable is governed by section 9-103, since the Code as revised provides that attachment of a security interest is essential to perfection,[134] that a security interest attaches when it becomes enforceable against the debtor,[135] and that prescribed events must occur to make a security interest enforceable.[136]

The commentary of those involved in the process of revision indicates that the intended scope of section 9-103 is less sweeping. The Reasons for 1972 Change offered in the Appendix to the 1972 Official Text with Comments, which appear to be largely carried over from the 1971 Final Report of the Review Committee for Article 9, explain that "the emphasis in the revision [of section 9-103] has been to make clear where perfection of a security interest must take place, rather than on problems of actual conflicts of rules of law,"[137] and that the deletion of the references to "validity" which appear in the 1962 version of 9-103 and the deletion from section 9-102 "make it clear that Article 9 does not govern problems of choice of law between the original parties, and that this question is governed by the general choice of law provisions in Section 1-105."[138] The Review Committee's additional commentary in the Appendix to its Final Report is even more specific: "The effect of the foregoing changes will be to have questions as to the creation and validity of security interests determined according to the conflict of laws rules in Section 1-105. . . . Questions as to perfection or nonperfection of security interests — *i.e.*, questions as to the rights of third parties — will be determined by Section 9-103."[139] Professor Homer Kripke, Associate Reporter for the Review Committee, has written that the revised

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[133]1972 OFFICIAL TEXT WITH COMMENTS § 9-504(1)(c),(4).

[134]*Id.* § 9-303(1).

[135]*Id.* § 9-203(2).

[136]*Id.* § 9-203(1).

[137]*Id.* § 9-103 Appendix, Reasons for 1972 Change, prefatory paragraph.

[138]*Id.* § 9-103 Appendix, Reasons for 1972 Change, item 1.

[139]REVIEW COMMITTEE FINAL REPORT 230, F-5.

Code leaves foreclosure questions to the general conflicts rules of section 1-105.[140] Professor Henson, a member of the Review Committee, appears to agree with Professor Kripke.[141]

If the opinions of those responsible for the redrafting are followed, then the scope of section 9-103 is quite narrow, being limited to questions of how and where to perfect (assuming that an enforceable security interest has attached), duration of perfection, and priorities as between the secured party and rival third-party claimants, at least insofar as those priorities are dependent on perfection or nonperfection. Relations between the debtor and the secured party are entirely outside the scope of section 9-103, including matters of foreclosure of the security interest. And while it is conceivable that foreclosure rules affecting relations between the foreclosing party and other secured parties would be governed by section 9-103's choice of law rules, while those concerned with relations between the forecloser and the debtor were governed by section 1-105, it seems unlikely that a court would refine the choice-of-law issues to that extent.

Section 1-105 thus opens the way to selection of the governing law by the original parties to a secured transaction by the terms of their security agreement to a substantially greater degree than is permissible under the 1962 Official Text.[142] It cannot be assumed, however, that they are given *carte blanche* to make their own law. They are required to select the law of a state to which their transaction bears a "reasonable relation." The Code does not define "reasonable relation," and it will be the courts of the state in which litigation occurs (assuming it to be a Code state) who will judge the "reasonable relation," not the parties themselves.

It is quite possible that a stipulation of the parties that the law of a particular state is to govern their contract would be given effect only in part, because the forum court concludes that there is a reasonable relation to the chosen state as to some aspects of the transaction but not as to others. Professor Henson has suggested a case where a security agreement is made in New York, where the secured party does business and the funds are advanced, but the borrower does business in Hawaii and the collateral is located there. If the agreement provided that New York law should govern all aspects of the transaction, it might well be effective to govern the relations of the parties generally, but if a default occurred and the secured party undertook to foreclose on the collateral in Hawaii, he doubts that New York law would be applied, for lack of a

[140]Kripke, *supra* note 23, at 815.

[141]R. Henson, Secured Transactions § 9-1 n.4.

[142]Compare text at notes 23 through 25 *supra*.

reasonable relation between New York and *that* aspect of the transaction.[143]

Mr. Peter Coogan, a Consultant to the Review Committee, has suggested another possible limitation on the parties' freedom to choose their law. He points out that although section 1-105 provides that the parties may agree on "the law" to govern their rights and duties, if the transaction bears a reasonable relation to the jurisdiction whose law is chosen, the next sentence provides that, failing such agreement, "this Act applies to transactions bearing an appropriate relation to this state." The second sentence suggests that it is intended to govern choice of law only as to matters with which the Code deals, and when the two sentences are read together, the intent may be inferred that the first sentence deals only with the power of the parties to choose the applicable law as to matters within the coverage of the Code. If, then, the parties were to choose the law of a particular state (or, rather, the secured party used his superior bargaining power to impose such a choice on the debtor) in order to escape from the restrictions of a retail installment sales act of another state having a substantial connection with the transaction, it could be concluded that section 1-105 has nothing to say about the validity of that stipulation, since Section 9-201 of the Code expressly saves from repeal statutes such as retail installment sales acts. Whether the parties' choice of law would be honored would then be governed by the forum's conflict of laws rules outside the Code.[144]

In the absence of an effective choice by the parties to the transaction, section 1-105 provides that "this Act applies to transactions bearing an appropriate relation to this state," and it seems a reasonable inference that if the courts of "this state" are not persuaded that such an appropriate relation exists, then they are directed to apply the law of such jurisdiction as they conclude does have an appropriate relation to the transaction. "Appropriate relation" is not defined by the Act, and the official comments on its meaning have not been changed from those of the 1962 Official Text.[145] It seems fair to conclude that when this sentence applies, the forum court is pretty much on its own and can be expected usually to apply whatever choice-of-law rules it would resort to if the Code were silent on choice of law.[146]

The reason given by the Review Committee for restricting the scope of Article 9's choice-of-law rules and relegating all but those relating to perfection to the more flexible general rules of section 1-105 is that the

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[143]R. HENSON, SECURED TRANSACTIONS § 9-1.

[144]Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 531 (1973).

[145]See text at notes 19 through 21 *supra*.

[146]*Id.*

earlier version of the U.C.C. was drafted at a time when it was uncertain whether the Code would be widely adopted and the possibility of conflict between Article 9's provisions and those of non-Code law was very substantial, the desire being to ensure that Code rules would apply where consistent with what the drafters considered sound principles of conflict of laws. Since then the Code has been adopted almost universally within the United States, and problems of actual conflict in rules of law will be rare,[147] and there is no reason why they cannot be satisfactorily settled under the general provisions of section 1-105.[148] There is still need, however, for definite guidance as to where filings should be made to perfect security interests, hence section 9-103 provides more specific rules on this subject.[149] It is inferrable that it was also felt that if a particular jurisdiction was the appropriate one in which to perfect a security interest, it is also the jurisdiction whose law should govern the effect of such perfection.

An incidental effect of these changes is to eliminate some of the problems of interpretation posed by the 1962 Official Text, such as the ambiguity of section 9-102 with regard to when property must be within the jurisdiction of a state in order to make its Article 9 applicable,[150] and the scope of the term "validity" in section 9-103,[151] but, as noted above, the revision may have raised some new problems of interpretation.

Section 9-103 has been completely rewritten in the 1972 version of the U.C.C. for ease of comprehension and certainty of application. Aside from the restriction of its scope to questions relating to perfection, the drafters consider that they have made little substantive change but have clarified the intent of the original.[152] The new section 9-103 is divided into five subsections, dealing respectively with (1) "Documents, instruments, and ordinary goods," (2) "Certificate of title," (3) "Accounts, general intangibles and mobile goods," (4) "Chattel paper," and (5) "Minerals." The section caption has been changed to "Perfection of Security Interests in Multiple State Transactions."[153]

To facilitate comparison with the 1962 Official Text the following analysis of revised section 9-103 will take up the various types of collateral in the same order as they were in the discussion of the 1962 text

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[147]Review Committee Final Report 229, F-2.

[148]1972 Official Text with Comments Appendix, § 1-105, Reasons for 1972 Change.

[149]*Id.* at Appendix, § 9-103, Reasons for 1972 Change, prefatory paragraph; Review Committee Final Report 229.

[150]See text following note 30 *supra.*

[151]See text following note 33 *supra.*

[152]1972 Official Text with Comments Appendix, § 9-103, Reasons for 1972 Change, item 2.

[153]Compare the caption to section 9-103 in the 1962 Official Text, discussed in the text following note 126 *supra.*

above, rather than in the order in which they are treated in the 1972 revision.

1. Goods

Subsections (1), (2), (3), and (5) of revised 9-103 contain choice-of-law rules for tangible personal property (goods) collateral. The three latter subsections apply to special categories of goods. Subsection (1) deals with the remainder, what the subsection caption refers to as "ordinary goods," more precisely defined in subdivision (a) of the subsection as "goods other than those covered in" the three other subsections. (It is characteristic of the revised section to try to make the ambit of each subsection as clear as possible.[154])

a. *Ordinary Goods.* The basic rule for choice of law to govern perfection of security interests in "ordinary goods" is that the governing law is that of "the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected."[155] This rule applies except as othewise provided in subsequent divisions of the subsection.[156] The rule is thought by the revisers to express the rule "intended but not articulated" in the 1962 Text.[157]

The rather cumbersome wording is accounted for partly by the fact that, under the Code, perfection is achieved when the last of several events occurs, and they may occur in any order. Perfection is dependent upon: (1) the making of a security agreement, either by writing signed by the debtor or accompanied or followed by the secured party's having possession of the collateral,[158] (2) the giving of value by the secured party,[159] (3) the acquisition by the debtor of rights in the collateral,[160] and, usually, (4) the filing of a financing statement or the secured party's acquisition of possession of the collateral.[161] Since there is no prescribed order for these events to occur and the goods may move from one state to another after some but less than all of them have occurred, if the rule as to what law governs is to be tied to the moment of perfection it must be expressed in a flexible manner.[162]

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[154]Compare discussion of 1962 Official Text in text following notes 69 & 126 *supra*.

[155]1972 OFFICIAL TEXT WITH COMMENTS § 9-103 (1)(b).

[156]*Id.*

[157]REVIEW COMMITTEE FINAL REPORT 230, F-6.

[158]1972 OFFICIAL TEXT WITH COMMENTS § 9-203(1)(a).

[159]*Id.* § 9-203(1)(b).

[160]*Id.* § 9-203(1)(c).

[161]*Id.* §§ 9-303(1), 9-302(1), 9-305.

[162]See 48 ALI PROCEEDINGS 251-52 (1971) (remarks of Justice Braucher); Funk, *supra* note 40, at 338; and the extensive discussion in Coogan, *supra* note 144, at 532-44.

The tying of the rule to the last event "on which is based the assertion" that the security interest is perfected or unperfected seems to be based on the way the question would arise in litigation. The secured party would contend that he had a perfected security interest which gave him priority over another party to the suit. To determine whether his assertion should be sustained the court would have to decide which state's law governed perfection and its effect. The direction given by section 9-103(1)(b) is that the court should look to the law of the state where the last event occurred on which the secured party bases his claim to a perfected interest. If, under the law of that state, perfection would indeed have been achieved at that time, then the security interest is to be treated as perfected at that time, and that state's law governs the effect of the perfection as well, even though under the law of some other state (including the forum) perfection would not have been achieved.[163] Even if the *rules* of all states were the same, selection of one would often be critical to determine where a financing statement had to be filed to perfect.

The objection has been made that the words "or unperfected" are superfluous.[164] Their function appears to be to direct choice of law in a case where it is contended that an achieved perfection lapsed. The law of the state where the goods were at the time when the last event occurred on which is based the assertion that lapse occurred is to be looked to to judge the validity of the contention and the effect of the termination of perfection.[165]

The general effect of revised section 9-103(1)(b) is to continue the situs-of-the-goods rule of Sections 9-102 and 9-103(3) of the 1962 Official Text, treating the location of the collateral as the factor controlling choice of law for perfection questions, rather than the location of the place of business of either party, the place where the security agreement was made, or any of the other factors which might be weighed in selecting the state with the most "appropriate relation" to the transaction under section 1-105. At the same time, the ambiguity of the rule of 1962's section 9-102 with regard to the time as of which the location test is to be applied is removed, as well as its ambiguity with regard to how long that state's law continues to govern, and the emphasis of the old 9-103(3) on the moment when the security interest attached is shifted to the moment when perfection or loss of perfection occurred.

In the case of goods which remain in a single state throughout the life of the secured transaction, the rule produces no difficulty, of course,

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[163]Compare suggested interpretation of section 9-103(3) of the 1962 Official Text, text at notes 35 & 36 *supra*.

[164]*See* 48 ALI PROCEEDINGS 252 (1971).

[165]*See id.* at 252-53 (remarks of Justice Braucher).

and no different results than the 1962 Text, insofar as perfection is concerned. If, for example, the 1972 amendments were adopted in all states and a corporation with its principal executive office in Mississippi were to borrow from a Memphis bank, granting a security interest to the bank in equipment located and remaining in the debtor's factory in Alabama, no matter where litigation occurred, Alabama law would be looked to to govern perfection, and filing to perfect the security interest would have to be made and maintained in Alabama, as directed by Alabama's Code.[166] The 1962 Official Draft would produce the same result through section 9-102.

When the goods move from state to state after the inception of the secured transaction but before all events necessary for perfection have occurred in the state where they were originally located, the rule will usually enable the secured party to determine where to file with greater certainty than the rules of the 1962 Text and seems to present prospective subsequent creditors of the debtor with no greater problem of where to search. If, for example (again assuming that all states adopted the revised version of the Code), a business firm with its principal office in Mississippi were to make a written agreement with a Memphis bank for future loans on the security of equipment of the debtor then located in its Alabama plant, but no commitment was made and no actual advance occurred until after the goods had been moved to another factory of the debtor located in Mississippi, it is clear under the 1972 rule that an Alabama filing would not be effective to perfect the security interest and that a Mississippi filing would be. This would be true whether filing occurred before or after the advance was made, for if filing occurred afterward, *it* would be the "last event" necessary for perfection, and if filing were made before, the giving of value would be the "last event," and in either case, since the goods were in Mississippi at the time, its law would govern perfection. The 1962 draft is not so clear because of the ambiguity of the "situs" rule of section 9-102 with regard to the time to which it refers.[167]

A loose end left by the "last event" rule is found in a case where filing occurs in a state inappropriate for perfection at the time the filing takes place, and all other events necessary for perfection occur while the collateral is outside the state of filing, but the goods are subsequently brought into the state where the filing was made. Does the filer now acquire a perfected security interest or is it necessary for him to file again after the goods arrive? Suppose, for example, that a Mississippi bank makes an advance to a Mississippi business firm under a written security agreement granting the bank a security interest in equipment

[166]*See* Kripke, *supra* note 23, at 816-17.

[167]*See* text at notes 30 through 33 *supra*.

of the debtor then located in Alabama and expected to remain there. The bank files financing statements in Mississippi in the offices specified by the Mississippi U.C.C. but makes no filing in Alabama. Clearly, it does not have a perfected security interest in the equipment because, if it contends that its filing was the last event necessary for perfection, in view of the fact that the collateral was at that time located in Alabama, Alabama law would determine whether the security interest was perfected, and Alabama's U.C.C. would require filing in that state; and if the secured party contended that the making of the advance or the making of the security agreement was the last event necessary for perfection, again Alabama law would be controlling. But suppose the debtor now moves the equipment to its plant in Mississippi. Does the moving of the collateral into Mississippi result in the acquisition by the secured party *at that time* of a perfected security interest, by reason of the fact that all events necessary for perfection under the law of Mississippi have already occurred? The logical difficulty is that the location of the collateral in Mississippi is not one of the events referred to by the U.C.C. as essential to perfection. To conclude that perfection was achieved when the collateral was moved into the state, it would be necessary to treat their movement across the state line as the "last event" necessary for perfection. If that contention did not hold up, the Mississippi bank would presumably have to file again in Mississippi *after* the collateral arrived in Mississippi in order to perfect its security interest.

The revised Code provides no clear solution to this problem. While arguments can be developed to support the contention that the security interest becomes perfected without a new filing, as soon as the collateral is brought into the state where filing has already been made,[168] their success is problematical, and the practical course for the secured party to follow would be to file again.

It is evident that the last-event rule of 9-103(1) of the 1972 Official Text can present troublesome problems for both secured parties and record searchers,[169] but it does appear to offer a surer guide in the majority of cases than do the rules of the 1962 Text.

The general rule of section 9-103(1)(b) of the revision is subject to two qualifications, comparable to those in the predecessor section 9-103(3), dealing with cases where the parties to a secured transaction expect the goods which form the collateral to be promptly moved to another state, and cases where goods already subject to a perfected security interest are permanently moved to another state.

Subsection (1)(c) provides:

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[168]Coogan, *supra* note 144, at 541-42.

[169]For additional development of this theme, see Coogan, *supra* note 144, at 548-54.

> If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or non-perfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty day period.

A comparison of this sentence with the comparable sentence of the 1962 Text[170] is instructive. The new rule is limited to cases involving *purchase money* security interests; no such limitation is found in the earlier rule. The new rule makes it clear that the law of the jurisdiction to which the goods are intended to be taken controls perfection of the security interest *before* the goods are removed to that jurisdiction for as long as 30 days from the time the debtor *receives possession* of the collateral, whereas the rule in the 1962 Text refers to a period of 30 days from the time of attachment and is by no means clear whether the law of the state to which the goods are intended to be removed controls before the goods are moved or only if or when they are moved within the 30 days.[171] The new rule is clearly concerned with the law governing perfection, while the earlier rule refers expressly only to the law governing "validity" of the security interest.[172]

The two rules are alike in that both refer to the understanding of the parties at the time the security interest attaches, rather than the time of the making of their contract, and neither rule would apply where the understanding that the goods were to be kept in another state was reached at any time after attachment.

An apparent difference between them is that the 1962 version refers to the goods being taken into the new jurisdiction within the 30-day period "for purposes other than transportation through [the] state," while the new wording speaks merely of the goods being "taken to the other jurisdiction before the end of the thirty day period." The revised official comments indicate that no real difference is intended: "kept," "brought" and related terms (presumably including "taken") "imply a stopping place of a permanent nature in the state, not merely transit or storage intended to be transitory."[173]

Finally, the application of the new rule appears to be somewhat broader. It directs the courts of the enacting state as to what law to apply in any case where it is found that the parties, at the time of the

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[170]Second sentence of § 9-103(3), quoted in the text following note 33 *supra*.

[171]*See* text following note 40 *supra*.

[172]*See* text at notes 39 & 40 *supra*.

[173]1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 3.

attachment of the security interest, understood that the goods were to be kept in another jurisdiction than the one in which they were at the time of attachment, whereas the 1962 rule in terms applies only where the understanding of the parties was that the goods were to be brought into "this state," the enacting state. This difference in wording, too, may not be of practical significance. The rule of the 1962 Official Text appears in the Code of each enacting jurisdiction. It can be read as not merely asserting jurisdiction over the security interest where the parties intend the goods to be moved to "this state" but also as recognizing the jurisdiction of any other state to which the parties intend the goods to be moved. In other words, the 1972 wording may merely express what is implicit in the 1962 wording.

As an illustration of the intended operation of the 1972 rule, suppose *A* and *B* enter into a contract in Mississippi for the conditional sale by *A* to *B* of goods which *B* intends to install in his Alabama factory, as *A* knows. Even though the goods are delivered to *B* in Mississippi, *A* can perfect his security interest in them by filing in Alabama, where the goods are to be kept, if both Alabama and the forum state have the 1972 rule in effect. The security interest will continue to be treated as perfected for a period of 30 days from the debtor's acquisition of possession of the goods, even though the goods remain in Mississippi or are taken into a third state. If they are taken to Alabama within the 30-day period, the security interest continues perfected; if they are not, the law of the state in which the goods are located at the end of the 30-day period controls perfection thereafter.[174]

It should be noted that the rule does *not* operate to give *A* a grace period for filing, so that if, for example, he filed in Alabama 20 days after *B* got possession of the collateral, his security interest would be deemed perfected from the time of attachment.[175] Sections 9-301(2) and 9-312(4) of the Alabama Code would give him some retroactive protection if he filed there within *10* days after *B* got possession of the collateral, but section 9-103(1)(c) merely indicates that Alabama law would control perfection and its effect during the 30-day period.

It should be noted also that *A* would not be protected by his Alabama filing before the goods were taken there if, when the security interest attached, *A* did not know where *B* intended to keep the goods, even if they were in fact taken to Alabama within 30 days after *B* got possesion.[176]

The reason for limiting this rule to purchase money interests is not explained in the revised Comments, the Reasons for 1972 Change ap-

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[174]*Id.* § 9-103, Comments 2, 3.

[175]*Id.* § 9-103, Comment 2.

[176]*See* Coogan, *supra* note 144, at 536-37.

pearing in the Appendix to the 1972 Official Text with Comments, or the Final Report of the Article 9 Review Committee. One commentator who was involved in the work of revision has suggested that it was intended to preserve, as much as possible, the integrity of the filing records of states other than the destination state in which the goods may be located during the 30-day period, by limiting the amount of collateral which can be present in such states subject to perfected security interests without local filing.[177]

The second qualification to the general "last event" rule of section 9-103(1)(b) is in subsection (1)(d), which indicates how long a perfection achieved in another state as to goods which were not intended by the parties to be moved continues if they are in fact moved into a Code state:

> When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Part 3 of this Article to perfect the security interest,
>
> (i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;
>
> (ii) if the action is taken before the expiration of the period specified in subparagraph (i), the security interest continues perfected thereafter . . . .

This is the "four-months" rule of Section 9-103(3) of the 1962 Official Text,[178] but it is more fully spelled out.

The ambiguity in the 1962 Text as to the effect of lapse of perfection by reason of the expiration of the 4-month period without reperfection under the law of "this state"[179] has been eliminated. The security interest is "thereafter deemed to have been unperfected as against a person who became a purchaser after removal." Thus, if *S* has a perfected security interest in goods in Alabama under Alabama law, and *D*, the debtor, brings the goods into Mississippi, under the revised Code *S*'s security interest ordinarily remains perfected in Mississippi for 4 months, and if *T* acquired a security interest in the same goods and perfected it during that period, his interest would be subordinate to *S*'s

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[177] *Id.* at 543.

[178] *See* text following note 41 *supra.*

[179] *See* text at note 42 *supra.*

under the first-to-file-or-perfect rule of revised section 9-312(5)(a).[180] But if *S* allowed the 4 months to run out without taking the steps required by the Mississippi Code for perfection (usually, filing in Mississippi), not only would his security interest become unperfected but it would be treated as retroactively unperfected back to the time the goods were brought into the state in favor of *T*, so as to promote *T*'s security interest to senior status under section 9-312(5)(a).

The meaning of the term "purchaser" is of key importance in dealing with such retroactive loss of perfection. It is defined in section 1-201, subsections (33) and (32) as including both buyers and persons taking more limited interests, such as secured parties, but it is fairly clearly limited to persons acquiring interests in the collateral through *voluntary* action of the debtor. Thus it does *not* include a levying creditor, the type of creditor the Code refers to as a "lien creditor."[181] In the hypothetical above, if *C*, an unsecured creditor of *D*, had acquired a lien on the collateral by judgment or execution[182] during the 4-month period after

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[180]Section 9-312 in both editions of the U.C.C. is the principal section dealing with priorities. After laying down some specific rules and incorporating others by reference, the section prescribes general rules for determining priority between competing security interests in subsection (5). In the 1962 version three rules are stated: (a) where both interests are perfected by filing, the first filed has priority; (b) where both are not perfected by filing, the first perfected takes priority; and (c) if neither is perfected, the first to attach has priority. The 1972 Text replaces these three rules with two: (a) the first interest to be filed or perfected, whichever occurs earlier, has priority, "provided there is no period thereafter when there is neither filing nor perfection"; and (b) as between unperfected security interests, the first to attach has priority.

[181]"A 'lien creditor' means a creditor who has acquired a lien on the property involved by attachment, levy or the like . . . ." 1972 OFFICIAL TEXT WITH COMMENTS § 9-301(3). The definition is the same as in the 1962 Official Text.

[182]Mississippi law presents a special problem as to how judgment creditors fit into the Code's rules concerning "lien creditors." A Mississippi statute provides that a circuit court judgment, upon enrollment, "shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof . . . ." MISS. CODE ANN. § 11-7-191 (1972). The statute has been construed as giving the judgment creditor a lien on the debtor's tangible personal property as well as his real property, though it does not extend to intangibles. Simmons-Belk, Inc. v. May, 283 So. 2d 592 (1973); Motors Securities Co., Inc. v. B.M. Stevens, Co., 225 Miss. 361, 83 So. 2d 177 (1955). Suppose a creditor of *D* acquires a judgment lien against him, which is duly enrolled and *D* has certain goods in the county of enrollment. The creditor has a lien on these goods under section 11-7-191, but did he acquire his lien "by attachment, levy or the like," so as to qualify as a "lien creditor" under Section 9-301(3) of the U.C.C.? Suppose he levies on the property in execution of his judgment. Has he "acquired" a lien on the property by attachment, levy or the like? It would be anomalous to rule that a judgment creditor could not become a "lien creditor" as to his debtor's tangible personal property but could become one as to the debtor's intangibles (as to which he cannot acquire a lien except by levy), yet it is not at all clear how the Code language can be reconciled with the judgment lien statute.

the goods were brought into the state, his lien would be subordinate to *S*'s perfected security interest at the time the lien was acquired, for the Code gives a lien creditor priority over unperfected security interests only.[183] Furthermore, if the 4-month period expired without *S*'s having taken the necessary steps to reperfect in Mississippi, *C*'s lien would still be subordinate to *S*'s security interest, under revised section 9-103(1)(d).[184]

One reason for distinguishing lien creditors from purchasers in this division of subsection (1) is that levying creditors are thought less likely to act on the basis of the appearance that the debtor's ownership of the goods is unencumbered during the 4 months of automatic perfection than is true of persons buying the goods from the debtor or lending on the security of the goods; hence, they do not deserve the same degree of protection.[185]

A second, and perhaps more important, reason is a fear that if levying creditors are given the benefit of the retroactive-unperfection rule, the secured party's claim to the goods may be vulnerable to the claim of the debtor's trustee in bankruptcy even if the secured party does reperfect before the end of the 4-month period. Under Section 60 of the Bankruptcy Act,[186] the trustee in bankruptcy has power to avoid certain "transfers" of property made by the debtor within 4 months before the inception of the bankruptcy proceedings, and a transfer of a security interest in personal property is deemed to have occurred "when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." The Code's revisers feared that if the Code permitted a lien creditor who became such during the first 4 months after goods were brought into a Code state to take priority over a secured party who had a perfected interest in the goods at the time they were brought into the state but who failed to reperfect under the law of the state within the 4-month period, then in cases to which the 4-months rule applied, even if the secured party *did* reperfect within the 4 months, "transfer" under the Bankruptcy Act would be considered to occur at the time of such reperfection and in many cases the security interest would be vulnerable to attack by the debtor's trus-

[183]1972 OFFICIAL TEXT WITH COMMENTS §§ 9-301(1)(b), 9-201. The same has been true under the 1962 Official Text, the only difference being that the 1962 Text does not give a lien creditor priority over even an unperfected security interest unless he became a lien creditor "without knowledge of the security interest" (1962 OFFICIAL TEXT WITH COMMENTS, § 9-301(1)(b)), while the 1972 Official Text omits the "without knowledge" requirement.

[184]This is provided by negative implication, in the view of the draftsmen. REVIEW COMMITTEE FINAL REPORT 245, I-7.

[185]48 ALI PROCEEDINGS 256 (1971) (remarks of Justice Braucher).

[186]11 U.S.C. § 96 (1970).

tee in bankruptcy if bankruptcy occurred within 4 months thereafter.[187] That would be inconsistent with the aim of the 4-months rule to enable the secured party to maintain the protection he had before the goods were moved, without interruption, in the state to which the goods were taken, provided he acts within 4 months to take whatever action is necessary to reperfect in the second state.

The revised version of the 4-month rule also removes the ambiguity that might be found in the 1962 Text as to what action the secured party must take before the end of the 4-month period in order to continue the perfection of his security interest beyond that time. As has been previously noted,[188] in a case where the secured party has achieved perfection in the state of original perfection without either filing or taking of possession of the collateral (as where he has a purchase money security interest in consumer goods), there is a question under the 1962 Text whether he is assured of permanently continued perfection if the goods are taken into another (Code) state or must file or take possession in that state in order to be protected longer than 4 months. The revised version provides that "if action is required by Part 3 of this Article to perfect the security interest" such action must be taken within the 4-month period. If action is not required by Part 3 to perfect a security interest of the type involved (*e.g.*, a purchase money interest in consumer goods)[189] the applicable rule is that "the security interest remains perfected."[190]

Another change in the 4-months rule has eliminated the possibility of the secured party's gaining perfection protection in the state to which the collateral is taken for a longer period than if the goods had remained in the state of original perfection.[191] Where action is required by Part 3 of Article 9 in the second state, it must be taken, to avoid loss of perfection there, "before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, *whichever period first expires.*" (Emphasis supplied.) If, then, secured party *S* perfected by filing in State A and debtor *D* moved the goods to State B (where the 1972 version of the Code was in force) a month before the effectiveness of *S*'s filing expired under the law of State A, *S*'s security interest would continue as an automatically perfected interest in State B for only 1 month.[192] This might be thought

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[187] *See* note 185 *supra.*

[188] *See* text at notes 45 & 46 *supra.*

[189] 1972 OFFICIAL TEXT WITH COMMENTS § 9-302(1)(d).

[190] *See* REVIEW COMMITTEE FINAL REPORT 235-36, F-22.

[191] *See* text following note 46 *supra.*

[192] 1972 OFFICIAL TEXT WITH COMMENTS 9-103, Comment 7; REVIEW COMMITTEE FINAL REPORT 235, F-21.

unfair to *S*, because he may not learn of the removal of the goods to State B and be able to refile there within so short a period, but he should know when his filing is due to expire in State A, and he can assure himself of the full benefit of the 4-months rule by filing a continuation statement in State A before his original filing lapses (at least, if State A is a Code state),[193] and this presumably is true even after the goods have been moved out of State A.[194]

The retroactive loss of perfection provided for in the new version of the 4-month rule serves to eliminate some of the circular-priority problems which could otherwise arise. It has been noted above[195] that if the 4-month rule of the 1962 Official Text is read as not providing for the loss of perfection to relate back to the time the goods are taken into a new state, it is possible to have a situation where the secured party has priority over a rival interest in the goods which arose during the 4-month period, which interest is entitled to priority over a competing interest arising after the expiration of the 4-month period, which interest is entitled to priority over that of the secured party. To the extent that the new rule treats the security interest as unperfected as against persons acquiring conflicting interests during the 4 months when the secured party allows that period to expire without taking the necessary steps to reperfect, the circle is broken. As an example, if *S* makes a loan to *D* on the security of "ordinary goods" and perfects by filing in State A, where the goods are, then *D* removes them to State B, where the 1972 amendments have been adopted, and during the period of automatic perfection provided by State B's 4-months rule *T* extends credit to *D*, takes a security interest in the same goods and perfects it by filing in State B; and if *S* allows the period to run out without refiling in State B, then *X* acquires a security interest in the goods and perfects it by filing in State B: (1) *T* is entitled to priority over *S* by reason of the rule of section 9-103(1)(d) that *S*'s interest is to be deemed unperfected as against one who became a purchaser after the goods were moved into State B and the first-to-file-or-perfect rule of section 9-312(5)(a); (2) *T*

[193]Under the Code as revised, a filed financing statement is normally effective for 5 years from the date of filing and lapses at the end of that time unless a continuation statement is filed prior to lapse. 1972 OFFICIAL TEXT WITH COMMENTS § 9-403(2). "Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective . . . ." *Id.* § 9-403(3). The 1962 Official Text also permits the filing of a continuation statement to continue the effectiveness of the original financing statement for 5 years, although the continuation statement must sometimes be filed less than 5 years after the filing of the original statement because it is possible for the original filing to lapse earlier than 5 years after the date of filing. 1962 OFFICIAL TEXT WITH COMMENTS § 9-403(2), (3).

[194]*See* note 192 *supra*.

[195]Text accompanying notes 43 & 44 *supra*.

is also entitled to priority over *X* under section 9-312(5)(a); and (3) *X* is entitled to priority over *S* under section 9-312(5)(a) and the provision of section 9-103(1)(d) that *S*'s security interest becomes unperfected at the expiration of the period of automatic perfection if he has not taken the action required by Part 3 of Article 9 of State B's Code. The priorities thus fall into a straight line: *T* over *X* over *S*. (The revision does not eliminate all possibility of circular-priority problems in cases of this type, however, since it does not extend the benefit of the retroactive loss of perfection rule to levying creditors.)

A point not made clear in the 1972 Text is whether, when goods subject to a security interest perfected in another jurisdiction are brought from that jurisdiction into "this state," the law of "this state" governs not only the questions of whether the security interest remains perfected, and for how long, but also "the effect of perfection or non-perfection." Paragraph (1)(d) does not speak of "the effect of perfection or non-perfection," and it could be reasoned that it therefore does not displace the rule of paragraph (1)(b) regarding such questions; *i.e.*, questions of priority between the security interest and competing interests in the collateral. Yet, since "this state" takes over control of perfection questions when the goods are brought into the state, it seems probable that it is meant to control priority questions dependent on perfection also (throughout most of section 9-103 the same law controls questions of both types), and, indeed, paragraph (1)(d) *does* deal expressly with one aspect of priorities, in its provision that if the secured party loses his perfection at the end of the grace period, the security interest is to be "deemed to have been unperfected as against a person who became a purchaser after removal."

The problem could be crucial if the priority rules of the two jurisdictions differed. Perhaps the failure to make the point clear is due to the fact that the wording of the 4-month rule of Section 9-103(3) of the 1962 Official Text is no clearer and yet it seems not to have caused much trouble. The Review Committee's approach to its task was, in general, to make changes only where the earlier text had proved troublesome, not where changes would merely effect theoretical improvement.[196]

Subparagraph (1) (d) (iii) of Section 9-103 in the 1972 Official Text contains a rule which is not strictly one governing perfection or its effect, though it is closely related. Under section 9-302(1)(d) filing is not required to perfect a purchase money security interest in consumer goods (other than motor vehicles required to be licensed and, in certain cases, fixtures). Since no section *requires* a taking of possession to perfect a security interest in goods, the interest is automatically perfected when

[196]Review Committee Final Report 196.

it attaches, and the secured party has most of the advantages accorded to holders of perfected security interests without having to do anything beyond making sure that his interest has attached. But he has an Achilles' heel. Section 9-307(2) provides that, "[i]n the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods." Filing is thus not necessary for *perfection* of a purchase money security interest in consumer goods, but it is essential for protection against the type of buyer described in section 9-307(2). The question arises whether, if such a secured party has filed in the state of original perfection and the goods are then taken to another (Code) state, the protection he had against section 9-307(2) buyers in the first state continues in the second state, and if so, for how long. The problem, which could arise in even more cases under the 1962 Official Text,[197] is not dealt with explicitly there. The 1972 Text provides that, "for the purpose of priority over a buyer of consumer goods (subsection (2) of Section 9-307), the period of effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (i) and (ii)"; *i.e.*, the filing in the state of original perfection gives the purchase money secured party protection against section 9-307(2) buyers for 4 months after the goods are brought into "this state" or until lapse of the original filing in the state where it was made, whichever period expires first, a new filing within that period in the second state is required in order to have continued protection, and if such filing is not made in time, the security interest is to be treated as unfiled as against a section 9-307(2) buyer who bought at any time after the goods were brought into "this state."[198]

b. *Mobile Goods.* "Mobile goods," defined in subsection (3)(a) of revised section 9-103 as "goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the

[197]Under the 1962 Official Text, sections 9-302(1) (c) and (d), the holder of a purchase money security interest in both consumer goods and farm equipment having a purchase price of $2,500 or less can acquire a perfected security interest without filing, but section 9-307(2) protects a buyer of either kind of collateral "if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes or his own farming operations unless prior to the purchase the secured party has filed a financing statement covering such goods." The 1972 Official Text deletes the exemption from filing as to farm equipment from section 9-302 and therefore narrows the rule of section 9-307(2) to apply only to security interests in consumer goods.

[198]REVIEW COMMITTEE FINAL REPORT 236, item F-22.

like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2)," are governed, as a general rule, with regard to perfection and its effect, by the "law (including the conflict of laws rules) of the jurisdiction in which the debtor is located."[199] A debtor is to be "deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence."[200] These general rules are subject to some qualifications, but before they are considered it would be useful to compare the general rules to those of the 1962 Text.

"Mobile goods" are treated in the 1962 Official Text in subsection (2) of section 9-103. The 1972 Text definition of the types of goods referred to follows fairly closely that of the earlier text. The 1972 Text refers explicitly to goods which are "mobile," an adjective not appearing in the 1962 Text, though it is used in the Comments,[201] but that change does not appear to produce any change in the scope of the subsection. The listing of examples is slightly different but does not appear significantly so.[202] The one difference that does appear to work a change is that the 1972 definition of "mobile goods" includes goods which are "inventory . . . held for lease," while the 1962 Text reference to inventory is limited to goods actually leased.[203] As in the 1962 Text, the coverage of the subsection depends on the type of goods involved and their classification as equipment or special kinds of inventory, not on whether they are actually moved from state to state with any frequency or at all.[204]

The revision selects the jurisdiction whose law is to govern perfection of security interests in "mobile goods" on the basis of the location of the debtor and provides specific rules for determining his location. If the debtor is in business and has but one place of business, that place of business is his location. If he has more than one place of business, his "chief executive office" fixes his location. This wording is more specific than the "chief place of business" referred to in Section 9-103(2) of the 1962 Text, for it precludes the possibility of a finding that the controlling law is that of the jurisdiction where the debtor has his biggest factory, warehouse, or other facility or some office of record under the law controlling the debtor's organization (in the case of a corporate

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[199]1972 OFFICIAL TEXT WITH COMMENTS § 9-103(2)(b).

[200]*Id.* § 9-103(1)(d).

[201]1962 OFFICIAL TEXT WITH COMMENTS 9-103, Comment 3.

[202]Compare 1962 Text quoted in the text accompanying note 48 *supra*. The Review Committee Final Report points out that the list has been expanded specifically to include shipping containers. REVIEW COMMITTEE FINAL REPORT 233, item F-13.

[203]*See* text accompanying note 55 *supra*. REVIEW COMMITTEE FINAL REPORT 233, F-13.

[204]See text accompanying note 54 *supra*. 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 5(b).

debtor), if that is not the principal place from which his business is actually directed.[205] The 1972 Text also plugs a gap left by the 1962 version, in providing that if the debtor is not in business, his residence is to be treated as his location.[206]

The qualifications to these general rules are three:

(1) The subsection deals explicitly with the question of the effect of a change in the debtor's location from one jurisdiction to another after a security interest has been perfected under the law of the state where he was originally located, a case not clearly covered in the 1962 Text.[207] The rule prescribed is similar to the 4-month rule applicable to "ordinary goods" under revised section 9-103(1)(d): the security interest remains perfected for 4 months or until perfection would have lapsed under the law of the first state, whichever period is shorter. "Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change."[208] It will be noted that this wording differs from that of subsection (1)(d), in that it does not refer to the possibility of permanently continued perfection by reason of the security interest being one which does not require action in order to achieve perfection. The principal case in which the revised Code does not require action to perfect a security interest is that involving a purchase money security interest in consumer goods, and consumer goods could not qualify as "mobile goods," for that category is limited to equipment and certain inventory. Filing in the new jurisdiction would almost always be necessary to continue the perfection of the security interest beyond the grace period.[209]

(2) If the debtor is a foreign air carrier under the Federal Aviation Act of 1958, it is to be "deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier."[210] This provision, slightly reworded, carries forward

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[205]See text accompanying note 56 *supra*. REVIEW COMMITTEE FINAL REPORT 232, item F-11. The official comments to the 1972 Text concede that there is a possibility of difficulty in determining the "chief executive office" of a multi-state enterprise but express the opinion that "it would be rare that there could be more than two possibilities. A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place." 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 5(c).

[206]See text following note 56 *supra*. REVIEW COMMITTEE FINAL REPORT, 232, F-12.

[207]*See* text accompanying notes 57 through 59 *supra*.

[208]1972 OFFICIAL TEXT WITH COMMENTS § 9-103(3)(e).

[209]*See* REVIEW COMMITTEE FINAL REPORT 234, F-17. In Code states the secured party could also perfect by taking possession of the collateral, and if he already had possession when the debtor's location changed, he would presumably need to take no further action, but it would be a rare case where it would be practicable for the secured party to perfect by possession prior to default.

[210]1972 OFFICIAL TEXT WITH COMMENTS § 9-103(3)(d).

an optional provision (not adopted in Mississippi) of the 1962 Official Text,[211] but it is no longer treated as optional. The Comments explain that without this provision "subsection (3) might refer such a case to the law of a foreign nation whose law is difficult or impossible to ascertain."[212]

(3) Paragraph (3)(c) of section 9-103 also deals with foreign debtors. If the debtor is located outside the "United States" (which term includes U.S. territories and possessions and Puerto Rico), and if the jurisdiction where the debtor is located does not provide for perfection of the security interest by filing or recording in that jurisdiction, then "the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or nonperfection of the security interest through filing." This continues, in somewhat modified form, a rule that appears in Section 9-103(2) of the 1962 Official Text. It appears not to be occasioned by fear that the perfection law of the foreign jurisdiction in which the debtor is "located" would be difficult or impossible to ascertain but rather by concern that such foreign law would not treat the debtor's location there as giving it jurisdiction over the security interest and the secured party would therefore have no way to perfect by filing under the general rule that the law of the debtor's location controls.[213]

As was observed above in discussing the 1962 Official Text,[214] it may be questioned whether this special rule is necessary, since the general location-of-debtor test refers to "the law (*including the conflict of laws rules*) of the jurisdiction in which the debtor is located" (emphasis supplied), and if the jurisdiction in which the debtor was located did not treat the security interest as one subject to its control, its conflict of laws rules could be expected to select another jurisdiction whose law would control. However, the selected jurisdiction would probably not be determined on the basis of where the debtor was but on where the goods were,[215] and the dominant purpose of the "mobile goods" provisions of section 9-103 is to avoid a situs-of-the-goods test for goods likely to be

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[211]See text following note 62 *supra*.

[212]1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 5(f). The rule is meant to govern the residual cases to which the Convention on the International Recognition of Rights in Aircraft (Geneva Convention) is not applicable. Where the Convention applies, it supersedes inconsistent state laws, and section 9-302(3)(a) expressly exempts such cases from Code filing requirements. *Id.*

[213]*See* 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 5(e). Compare discussion of comparable rule in the 1962 Official Text. Text accompanying note 61 *supra*.

[214]*See* text accompanying note 62 *supra*.

[215]*See* 2 G. GILMORE, SECURITY INTERESTS § 22.3.

moving frequently from one jurisdiction to another and to select the governing law on the basis of less changeable facts.

c. *Certificated Goods.* Goods covered by certificates of title will, in many cases, not be governed by the rules for "ordinary goods" of section 9-103(1) of the revised Code nor by those relating to "mobile goods" in section 9-103(3), but by the rules of section 9-103(2). This subsection is the successor to Section 9-103(4) of the 1962 Official Text, but it has been much expanded to clarify its operation.[216]

The scope of the subsection is defined as follows: "This subsection applies to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection."[217] The description of the type of certificate of title which brings the subsection into play follows fairly closely the wording used in Section 9-103(4) of the 1962 Text and raises, and leaves unanswered, some of the same questions. For example, when is a vehicle or other chattel[218] "covered" by a certificate of title? One might suppose a case of a title certificate issued by a state which has so little connection with the vehicle and its owner as to be lacking in jurisdiction to control the title to the goods; would the property nevertheless be "covered" by a certificate of title within the meaning of section 9-103(2)(a)? The draftsmen of the revision were not unaware of this sort of problem but chose not to attempt to resolve it because of the difficulty of prescribing a rule which would not upset present titling practices in some states, a belief that the problem is not one of major proportions at present, and confidence that the courts could satisfactorily resolve the few cases that might arise.[219] Probably somewhat similar considerations led them to avoid specific treatment of the question whether goods are "covered" by a certificate of title when one has been applied for but it has not yet been issued. The problems presented by the existence of more than one outstanding certificate of title on the same vehicle are partially dealt with in later paragraphs of subsection (2), but the Code's revisers considered it preferable to leave to the courts the working out of other questions

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[216]*See* text accompanying notes 68 through 72 *supra*, as to the difficulties presented by the 1962 Official Text.

[217]1972 OFFICIAL TEXT WITH COMMENTS § 9-103(2)(a).

[218]As does section 9-103(4) of the 1962 Official Text, the 1972 version refers to "goods" of any sort if covered by a certificate of title of the type described. However, since motor vehicles are the principal type of goods covered by present-day title acts, the term "goods" will be treated as interchangeable with "motor vehicle" in the text discussion of section 9-103(2).

[219]*See* 48 ALI PROCEEDINGS 267-68 (remarks of Professor Kripke), 272 (remarks of Justice Braucher) (1971).

raised by fraudulent procurement of duplicate certificates.[220] No attempt has been made to deal more specifically with the question of when the law of a state is to be deemed to make indication of a security interest on a certificate of title a condition of perfection, presumably because state title laws are so diverse that no workable rule of greater specificity could be devised.

Assuming that subsection (2) is applicable, it provides three paragraphs of rules on what law governs perfection and the effect of perfection or non-perfection of security interests in the certificated goods. As their operation is complex, it is advisable to set forth the text of all three paragraphs before undertaking an analysis of their effect:

> (b) Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond the surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.
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> (c) Except with respect to the rights of a buyer described in the next paragraph, a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this state and thereafter covered by a certificate of title issued by this state is subject to the rules stated in paragraph (d) of subsection (1).
>
> (d) If goods are brought into this state while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this state and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after the issuance of the certificate and without knowledge of the security interest.

The number of possible factual permutations is almost infinite. To develop the main points of the revised Code's certificate of title provisions without getting lost in unmanageable complexity, they will be discussed on the following assumptions: a security interest in a motor vehicle is created while the vehicle is located in State A; the vehicle is subsequently moved to State B, where it remains and where any priority litigation will occur; a conflicting interest in the vehicle arises while the

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[220] *Id.* at 272 (remarks of Professor Kripke).

vehicle is in State B; if the vehicle is covered by a certificate of title when it is moved from State A to State B, the certificate has been issued by State A under a statute of the type described in paragraph (a) of subsection (2) under any certificate of title law fitting the description of subsection (2)(a) actual notation of the security interest on a certificate of title is essential to perfection; the 1972 Official Text of the U.C.C. has been enacted and is in force in both states; neither state has a certificate of title act which would override any provisions of its U.C.C.; and goods are not to be deemed "covered" by a certificate of title unless a certificate has actually been issued.

(1) *Vehicle not certificated when moved to State B.* First, we may consider cases in which the vehicle is *not* covered by a certificate of title at the time it is moved from State A to State B:

(a) *No certificate issued by State B.* If no certificate of title as to the vehicle is issued *after* its removal to State B, subsection (2) of section 9-103 will have no application at all. Perfection of the security interest will be governed either by the law of the jurisdiction in which the debtor is located, under the "mobile goods" provisions of subsection (3) (if the vehicle is equipment, leased inventory or inventory held for lease), or by the law of the state where the vehicle was located at the time of the last event on which is based the assertion that the security interest is perfected or unperfected, under the "ordinary goods" provisions of subsection (1) (if the vehicle is consumer goods).

(b) *Certificate issued by State B.* If State B issues a certificate of title on the vehicle after it is brought into the state, it is necessary to consider the type of title law under which the certificate was issued. State B's law may be one which requires notation of a security interest on the certificate of title as a condition of perfection or it may provide for perfection of security interests in some other way.

(i) *Non-exclusive title act in State B.* If the law under which the certificate is issued does not require notation of the security interest on the certificate of title as a condition of perfection, again subsection (2) will have no application, for the goods are not covered by a certificate of title of the type described in paragraph (a).

(ii) *Exclusive title act in State B.* If the law under which the certificate is issued *does* require that a security interest be shown on the certificate of title in order to be perfected, subsection (2) will apply, but its effect will vary, depending on whether the security interest which arose before the goods were moved into State B was perfected at the time of the move, whether or not the security interest is shown on the certificate

issued by State B, and the nature of the competing interest arising in State B.

(A) *Security interest unperfected when goods removed to State B.* If the security interest was *unperfected* when the goods were brought into State B, which would be determined by the law of the jurisdiction where the debtor was located in the case of "mobile goods" (subsection (3)) or under the last event rule of subsection (1) in the case of "ordinary goods," perfection is probably governed by the law of the jurisdiction selected by one of those subsections until State B issues its certificate of title. Subsection (2) seems not to apply in the interim because the goods are not then covered by a certificate of title of the type described in paragraph (a) of that subsection. However, once State B issues its certificate, subsection (2) becomes applicable (it applies, according to paragraph (a), whether the certificate is issued "under a statute of this state or of another jurisdiction"), and the governing rule is that of paragraph (2)(b), that "perfection and the effect of perfection or non-perfection . . . are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate" as long as the goods remain there and the certificate remains outstanding. State B's title law will govern whether the security interest is perfected or unperfected, and State B's U.C.C. rules will govern the effect of perfection or non-perfection. (Section 9-302(3) (b) exempts property subject to State B's certificate of title acts from Code filing rules, and section 9-302(4) makes the title acts controlling as to achievement of perfection, its duration and its renewal, but provides that "in other respects the security interest is subject to this Article.")[221]

(B) *Security interest perfected when goods removed to State B.* If the security interest was perfected when the goods were moved from State A to State B, since we are assuming that State A issued no certificate of title, the applicable rule appears to be that of paragraph (2)(c); "A

[221]If the certificate issued by State B shows the security interest, it will be a perfected one under State B's title law. If the certificate does not show the security interest, it will remain unperfected under State B's title law. Should the certificate show another security interest but not the one to which the vehicle was subject when brought into State B, the one shown on the certificate will be perfected while the other will be unperfected, under State B's title law, and the perfected interest will have priority over the unperfected one under section 9-312(5)(a) of State B's U.C.C. Coogan, *supra* note 144, at 545-46.

security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this state and thereafter covered by a certificate of title issued by this state is subject to the rules stated in paragraph (d) of subsection (1)"; *i.e.*, the 4-month rule for "ordinary goods."[222]

It will be noted that the applicability of this paragraph cannot be determined at the time the vehicle is brought into State B; it becomes applicable if and when State B issues a certificate of title of the type described in paragraph (2)(a). In the case of "ordinary goods" that should cause no difficulty, for the security interest in them will be governed by paragraph (1)(d) directly until the certificate is issued and then by paragraph (1)(d) by direction of paragraph (2)(c). In the case of "mobile goods," however, the operation of paragraph (2)(c) could produce effects surprising, and seemingly unfair, to the secured party.

Assume that "mobile goods" subject to a security interest which has been perfected by filing in the state where the debtor is located are brought into State B. Until State B issues a certificate of title covering the vehicle, the perfected status of the interest is presumably governed by subsection (3) of section 9-103: it remains perfected in State B for as long as it is perfected under the law of the state where filing was made (unless the debtor's location should change). Suppose that State B issues a certificate of title on the vehicle 6 months after the vehicle has been brought into the state, and the certificate does not show the security interest. If paragraph (2)(c) now becomes applicable, bringing into operation the 4-month rule of paragraph (1)(d), the security interest would suddenly become unperfected retroactively, by 2 months as to all competing interests, and by 6 months as against persons who "purchased" interests in the goods during the first 4 months after the goods were brought into State B. The secured party, who has probably been relying on the perfection rules of the state where the debtor is located, is likely to suffer severe shock.

The probable purpose of the rule of paragraph (2)(c) is to assure that secured parties with perfected interests in

[222]Paragraph (2)(c) is inapplicable because of its prefatory words, "Except as otherwise provided in this subsection . . . ."

"ordinary goods" will have the protection of the 4-month rule of paragraph (1)(d) even in a case where the state to which the goods are removed issues a "clean" certificate of title (one not showing any security interests) before the grace period allowed by paragraph (1)(d) expires;[223] the 1962 Official Text is not clear on this point.[224] In the light of this purpose, it seems that paragraph (2)(c) should be read as applicable to "ordinary goods" only. Moreover, application of the rules of paragraph (1)(d) to "mobile goods" collateral would at times be awkward, since it refers to "a security interest perfected under the law of the jurisdiction from which the collateral was removed" (a security interest in "mobile goods," under subsection (3), is perfected under the law of the jurisdiction where the debtor is located), and it provides for continuance of perfection no longer than "the period of perfection in the other jurisdiction"; *i.e.*, the jurisdiction from which the goods were removed (whereas, in the case of "mobile goods," it would seem that the reference should be to the law of the state of the debtor's location.)

If paragraph (2)(c) applies only to "ordinary goods," however, then "mobile goods" would be governed by the rule of paragraph (2)(b), and State B's law would govern perfection and its effect as soon as State B issued its certificate. If it was a "clean" certificate, the interest would immediately become unperfected (unless State B's *title law* provided for a longer grace period), and whatever grace period the secured party had for tracing the goods into State B and gaining perfection under its internal law would depend on the chance of timing of the issuance of the State B certificate of title. The operation of subsection (2) to cases involving "mobile goods" seems rather haphazard.

In a case to which paragraph (2)(c) *does* apply, its effect is to assure the secured party automatically continued perfection of his security interest in State B for 4 months from the time the vehicle is moved to that state unless he would have lost his perfection earlier under the law of the state of original perfection. At the end of the grace period State B's title law will control the perfected status of the security interest. (Although paragraph (1)(d)

[223]Review Committee Final Report 240, G-12, G-13.

[224]See R. Henson, Secured Transactions § 9-7 nn. 44 & 45.

of section 9-103 provides that the security interest becomes unperfected "if action is required by *Part 3 of this Article* to perfect the security interest" [emphasis supplied] and "the action is not taken" by the end of the grace period section 9-302(3)(b) and (4), in effect, incorporate the state's title acts to govern perfection of security interests in property subject to such acts.) If, under State B's title law, the security interest becomes unperfected as of the end of the grace period allowed by paragraph (1)(d) of section 9-103, the loss of perfection will, by operation of that paragraph, be retroactive in favor of anyone who became a purchaser after the goods were brought into the state, though not in favor of unsecured creditors levying during that period (or, presumably, the debtor's trustee in bankruptcy if bankruptcy proceedings were begun during the grace period). Otherwise, the effect of perfection or loss of perfection will be governed by Part 3 of Article 9 of State B's U.C.C.

Even during the grace period provided by paragraph (1)(d), however, the secured party runs a risk of loss, because the rule of paragraph (2)(c) is subject to that of paragraph (2)(d): the secured party will lose out to a non-professional buyer of the goods (*i.e.*, one not a dealer in such goods) who buys after State B has issued its certificate of title and who gives value and takes possession in ignorance of the security interest, unless the State B certificate shows the security interest or warns that the vehicle may be subject to undisclosed security interests. The thought behind this rule is that State B has a legitimate interest in protecting the expectations of those innocents who rely on its "clean" certificate of title as proof that the title is clear.[225] Professional vehicle dealers can be expected to look out for themselves and to know that a vehicle recently arrived in the state may be subject to perfected security interests despite the existence of a "clean" certificate issued by State B.[226]

It should be noted that, notwithstanding this rationale, a non-professional buyer may have the protection of paragraph (2)(d) without proof that he did in fact

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[225] 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 4(e); REVIEW COMMITTEE FINAL REPORT 240-41, G-15.

[226] 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 4(e); Funk, *supra* note 40, at 341-42.

rely on the title certificate. On the other hand, the protection is accorded only to "buyers," not to other "purchasers" (such as other secured parties), whether professional or non-professional;[227] nor are levying creditors or trustees in bankruptcy protected.[228]

(2) *Vehicle certificated when moved to State B.* Suppose, now, that the vehicle *is* covered by a certificate of title of the sort decribed by paragraph (2)(a) at the time it is moved from State A to State B:

(a) *Security interest unperfected when goods brought into State B.* If the security interest is not shown on the State A certificate, it will be an unperfected one at the time the vehicle is brought into State B. Under paragraph (2)(b), "perfection and the effect of perfection or non-perfection . . . are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond the surrender of the certificate."

Assuming that the certificate of title is not surrendered, the effect of this rule appears to be that, as a practical matter, the security interest must remain unperfected in State B for at least 4 months. The law of State A governs perfection for at least that long, and while theoretically the secured party could perfect his security interest under the law of State A, he would have to do so by procuring a State A title certificate showing his security interest and probably could not do so without surrendering the outstanding certificate, which is not likely to be in his possession. State B has, in effect, disclaimed jurisdiction over security interests in the vehicle for at least 4 months; even if the secured party were able to procure a State B certificate showing his security interest, it would seem to be ineffective to perfect his interest during the 4-month period unless the outstanding certificate was surrendered.[229] Regis-

[227]The Official Comment attributes the exclusion of other secured parties from the protection of paragraph (2)(d) to the fact that "these are ordinarily professionals." 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 4(e).

[228]Mr. Funk has explained that the Review Committee "felt that execution creditors and trustees in bankruptcy should be subordinate to the secured party in the first state during the 4-month period, even though a new certificate of title was issued in the second state, since in few if any cases would such creditors or the trustees have relied on the certificate." Funk, *supra* note 40, at 342.

[229]A possible counter-argument is considered in the text accompanying notes 239 & 240 *infra*.

tration (*i.e.*, licensing)[230] of the vehicle in State B does not cut off the controlling effect of State A's perfection law during the first 4 months; it merely determines whether State A's perfection law continues to control beyond the 4-month period and, if so, for how long.

A possible out, but a dubious one, is the fact that paragraph (2)(b) of State B's section 9-103 defers to all the perfection law of State A during the first 4 months after the vehicle is brought into State B, not merely its internal law but also its conflict of laws rules. If State A's conflicts rules are consulted, there is an initial problem of which rules are referred to, those other than such as appear in its U.C.C. or those in the Code. The latter seems the more appropriate choice, since the Code, to the extent that it provides rules, is meant to supersede prior rules on the same subjects.[231] But the relevant rule would then be that of State A's section 9-103 (2)(b), making its own "law (including the conflict of laws rules)" controlling for the first 4 months after the vehicle is removed from the state. Does this second reference to State A's conflict of laws rules call into play some new choice of law rules? It seems unlikely that any such round-about incorporation of non-Code law was intended by the draftsmen or would be a sensible reading of the statute. Probably State A's internal perfection law should be considered controlling during the 4-month period.[232]

The plight of the secured party in this instance does not strongly appeal for remedy because he is little worse off than he would have been if the vehicle had remained in State A, and his failure to achieve perfection there is, in all probability, due to his

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[230]The term "registered" is not defined in the act, nor in the official comments or the Review Committee's commentary. The main concern of the Committee appears to have been to assure that the law of the state which issued a certificate of title before the vehicle was moved to another state would continue to control perfection questions for at least 4 months, notwithstanding licensing in the second state during that period, provided the certificate remained outstanding. See 48 ALI PROCEEDINGS 268-69 (remarks of Professor Kripke) (1971).

[231]Section 1-103 provides that, "*Unless displaced by the particular provision of this Act*, the principles of law and equity . . . shall supplement its provisions." (Emphasis supplied.)

[232]See Coogan, *supra* note 144, at 547-48. *See* 48 ALI PROCEEDINGS 283-85 (remarks of Mr. Coogan and Justice Braucher) (1971). (The inclusion of the references to "conflict of laws rules" in subsections (2), (3) and (5) of revised section 9-103 was apparently motivated by the thought that the choice-of-law rules of these subsections might select the law of a jurisdiction whose internal law would not treat the security interest as subject to its jurisdiction; in that event, the conflict of laws rules of that jurisdiction would select the law of another jurisdiction, whose internal perfection law hopefully could be applied. Curiously, the rules of subsection (1) do not mention "conflict of laws rules".)

own negligence. Still, the question may be raised why State B should not afford him an opportunity to perfect his interest immediately after the goods are brought into the state, especially if State B has no exclusive certificate of title act of its own. The explanation presumably lies in a desire to support the policy of exclusive certificate of title acts by giving them a limited extraterritorial effectiveness.[233]

After the 4-month period has expired *and* the vehicle has been registered in State B, or if at any time the State A title certificate is surrendered, then "the goods are not covered by the certificate of title within the meaning of this section."[234] State A's perfection law is no longer controlling by force of subsection (2). What law does control and how can the secured party perfect his security interest?

(i) *Exclusive title act in State B.* If State B has a certificate of title law which requires notation of a security interest on the certificate as a condition of perfection, *and* if State B has already issued a certificate showing the security interest, paragraph (2)(b) should give the secured party a perfected interest as of the moment that State A's perfection law ceases to be controlling. Although the goods are no longer "covered" by the State A certificate, they are now "covered" by the State B certificate, and *its* title law becomes controlling as to perfection.

If State B has already issued a certificate of title which does *not* show the security interest, the interest will remain unperfected because, again, State B's title law becomes effective, by virtue of paragraph (2)(b), as soon as State A's law ceases to control, and under State B's law, we are assuming, notation of the security interest on a certificate of title is essential to perfection.

If, as is most likely, State B has issued no certificate of title, then the vehicle is not covered by a certificate of title at all, within the meaning of subsection (2), and the subsection ceases to apply at all unless and until State B does issue a

[233]The official comments indicate that the starting point of the reasoning behind subsection (2) is the idea that a certificate of title issued under an "exclusive" certificate of title act "should control the property interests in the vehicle wherever the vehicle may be." That the subsection does not fully implement this policy is due to the variations among state certificate of title laws and titling practices and the possibilities of fraudulent procurement of duplicate certificates. 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 4(b).

[234]*Id.* § 9-103(2)(b).

certificate. Meanwhile, reference must be to subsection (1) if the vehicle is "ordinary goods" or subsection (3) if it is "mobile goods" to select the law governing perfection of the security interest. In the latter case the law of the debtor's location will control, which may be the law of State B or the law of another jurisdiction. In the case of "ordinary goods," the law will be that of the jurisdiction where the goods are when the last event occurs on which is based the assertion that the security interest is perfected or unperfected; the "last event" here would presumably be the expiration of the effectiveness of State A's law to control perfection,[235] so the law of State B would control perfection from that time. It follows that, except where the collateral is "mobile goods" *and* the debtor is located outside State B, State B's perfection law controls, and since we are assuming that State B's law requires notation of a security interest on a certificate of title as a condition of perfection and that no such certificate has been issued, the security interest remains an unperfected one and will so remain until the secured party procures issuance of a State B certificate of title showing his security interest.

(ii) *No exclusive title act in State B.* If State B does not have a certificate of title act or if, though there is one, it does not require notation of a security interest on the certificate as a condition of perfection, then again subsection (2) becomes inapplicable, whether or not State B has issued a certificate and whether or not the certificate shows the security interest. The controlling law will be that of the jurisdiction selected by the last-event rule of subsection (1) or the location-of-debtor rule of subsection (3), and, as noted in (i) above, that law will be State B's unless the goods are "mobile goods" and the debtor is located in a state other than State B. To perfect under the law of State B, the secured party would have to comply with the perfection rules of State B's title act, if it has one, or the rules of Part 3 of Article 9 of State B's U.C.C.

(b) *Security interest perfected when goods brought into State B.* If the vehicle were covered by a State A certificate of title when it was brought into State B, and the security interest were shown on the certificate, so as to give the secured party a perfected

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[235]Comment 1 to section 9-103 asserts that, "If the security interest was perfected in one jurisdiction and then removed to another jurisdiction, maintenance of perfection in the latter jurisdiction or failure to do so is the 'last event' to which the basic rule refers." 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 1. See Coogan, *supra* note 144, at 548-49.

interest under the law of State A, again the applicable rule will be that of paragraph (2)(b), but this time it will operate to continue the perfected status of the security interest in State B for at least 4 months, and thereafter until the vehicle is registered in State B, unless the State A certificate is surrendered earlier.[236]

This presumably is true even though State B issues a "clean" certificate of its own before that period expires and State B's title law requires notation of a security interest on the certificate as a condition of perfection, for State A's law continues to control perfection during that period.[237] The only difference issuance of such a certificate would make would be to open the possibility that the secured party would lose his claim to the vehicle by reason of its sale to a non-professional buyer in State B after the issuance of the State B certificate, under paragraph (2)(d).[238]

It could be argued, to the contrary, that issuance by State B of a certificate of title of the type described in paragraph (2)(a) while State A's certificate is sill outstanding makes subsection (2) entirely inapplicable because paragraph (2)(a) provides that the subsection applies where goods are covered by *a* certificate of title of the type described. More likely, "a" should be read as meaning "one or more," and paragraph (2)(b) should be read as applicable to the two certificates in the order of their issuance; *i.e.*, State A's law would control to the end of the grace period specified by paragraph (2)(b), then State B's law would take over.[239] This reading gives effect to a probable purpose of the paragraph, to allow the State A secured party time to trace the vehicle into State B and take steps to protect himself there without intervening loss of perfection; and it preserves the rule of paragraph (2)(d) for the benefit of non-professional buyers after State B issues a certificate of title which neither shows the security interest nor warns of its possible existence.[240]

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[236]The basic principle appears to be that a "security interest perfected by notation on a certificate of title will be recognized without limit as to time," but that assumes that the certificate remains outstanding (a matter usually within the control of the secured party); reregistration of the vehicle involves danger of deception of third parties, so the secured party's protection by the certificate is limited to minimize that danger. 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 4(c).

[237]*See* 48 ALI PROCEEDINGS 272 (remarks of Professor Kripke) (1971); Coogan, *supra* note 144 at 549-50.

[238]*See* 48 ALI PROCEEDINGS 212 (remarks of Professor Kripke) (1971).

[239]Coogan, *supra* note 144, at 549-50.

[240]*Id.* at 549.

When the vehicle ceases to be "covered" by the State A certificate under paragraph (2)(b), by reason of the surrender of that certificate or the expiration of 4 months and the registration of the vehicle in State B, the status of the security interest depends on what sort of title law, if any, is in force in State B and what has happened in the meantime.

(i) *Exclusive title act in State B.* Assuming that State B has a certificate of title act of the type that makes notation of a security interest on the certificate a condition of perfection, the first question would be whether State B had issued a certificate of title by the time the vehicle ceased to be "covered" by the State A certificate. If not, then the vehicle would not be covered by a certificate of title at all, within the meaning of subsection (2), and its provisions would no longer be operative. Resort would now have to be to the "ordinary goods" rules of subsection (1) or the "mobile goods" rules of subsection (3). If those rules selected the law of State B as controlling perfection, the controlling law would be State B's title act. Except to the extent that the title act provided a grace period of continued perfection, the security interest would immediately become unperfected and would remain so until State B issued a certificate of title showing the security interest. If the applicable law were that of a state other than State B (where the debtor was located), that state might or might not have an exclusive certificate of title act. However, since the vehicle was not in that state when its law became applicable and it remains out of that state, it is unlikely that its title act would require titling there and the relevant law would presumably be its U.C.C. (if it is a Code state), requiring, in most cases, that the secured party either file there or take possession of the collateral in order to perfect his security interest. That law would cease to control if and when State B issued a certificate of title, for that would bring paragraph (2)(b) into operation again.

Should the security interest become unperfected when State A's law ceases to control, because State B's law now becomes controlling and its title act treats the security interest as unperfected, a question may be raised whether the loss of perfection has retroactive effect, so as, for example, to give priority to a rival secured party who acquired a perfected security interest in the goods before State A's law ceased to be controlling. It would seem that this is not a question of whether the security interest was perfected or not when the rival secured party per-

fected his own interest (a matter which would be controlled by State B's title act), but one of "the effect of perfection or nonperfection" (controlled by Article 9 of State B's U.C.C.), since it is a question of whether the security interest is to be "deemed to have been unperfected" at a time when it was in fact and law perfected, for purposes of working out a priority question. The rule of paragraph (1)(d) seems not to be applicable because subsection (1) does not apply to goods "covered by a certificate of title"; these goods were covered by such a certificate when brought into the state; and subsection (2)(b) provides its own rule for determining how long the security interest remains perfected in State B, without reference to paragraph (1)(d). If the goods are "mobile goods," paragraph (1)(d) is even more clearly inapplicable. If paragraph (1)(d) does not apply (and it would be difficult to coordinate with paragraph (2)(b) in any event), it appears that the law of State B is simply silent on the question. Perhaps the courts could work out an answer of their own, by analogy to paragraph (1)(d) or otherwise, by authority of section 1-103: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions."[241]

If State B *had* issued a certificate of title by the time the vehicle ceased to be "covered" by the State A certificate, the vehicle would then presumably be "covered" by the State B certificate, and State B's law would govern perfection, under paragraph (2)(b). If the certificate showed the security interest, the interest would continue perfected under State B's title law. If the certificate did not show the security interest, State B's title law would presumably lead to the conclusion that the security interest had become unperfected when State A's law ceased to control perfection. The same question as to the possibility of retroactive loss of perfection would arise as was discussed in the preceding paragraph.

(ii) *No exclusive title act in State B.* If State B does not have a certificate of title act or if, though it has one, the act does not require that a security interest be shown on the certificate as a condition of perfection, subsection (2) will cease to apply

[241]Mr. Funk has expressed the opinion that the loss of perfection *is* retroactive in favor of purchasers who acquire their interests in the collateral during the period of automatically continued perfection in State B. He appears to assume that the retroactivity rule of paragraph (1)(d) applies, but he does not detail his reasoning. Funk, *supra* note 40, at 343.

as soon as State A's certificate is no longer deemed to "cover" the vehicle under paragraph (2)(b). The results from there on will be the same as those discussed above in part (a)(ii).

In any case where State B, having an "exclusive" certificate of title law, has issued a certificate of title covering the vehicle and the certificate does not show a security interest which existed at the time the vehicle was brought into the state, the secured party is likely to have difficulty assuring himself of continued perfection in State B beyond the temporary grace periods granted by subsection (2). Most such certificate-of-title laws require surrender of the outstanding certificate before a new certificate will be issued, and since the outstanding certificate will be in the hands of the debtor or another secured party, the original secured party will have to secure the cooperation of the holder of the certificate in order to perfect his own security interest.[242] The Code does not try to resolve this problem, solution being considered to lie in reform of the certificate of title laws;[243] absent such reform, the official comments suggest that the "only solution for the out-of-state secured party under present certificate of title laws seems to be to reperfect by possession, i.e., by repossessing the goods."[244] However, even that method of reperfection would have to be authorized by the State B *title law*, for it, rather than the perfection provisions of State B's U.C.C., would be controlling.

The foregoing analysis demonstrates that the operation of subsection (2) of section 9-103 and the closely related subsections (1) and (3) is highly complex. While such complexity may be regrettable, it is largely accounted for by the need to cope with the lack of uniformity in state certificate-of-title legislation and practices, plus the fact that the rules of subsection (2) represent some compromise choices between conflicting policy considerations. It can be said, at any rate, that the 1972 Official Text of the Code resolves some of the troublesome problems presented by the 1962 Official Text with regard to certificated goods and represents an improvement over the earlier text.

d. *The Mississippi Motor Vehicle Title Law.* In the event that the Mississippi Legislature enacts the changes in the text of the Uniform Commercial Code that are embodied in the 1972 Official Text, the effect

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[242]1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 4(e); Funk, *supra* note 40, at 343.

[243]See Funk, *supra* note 40, at 343.

[244]1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 4(e); R. HENSON, SECURED TRANSACTIONS § 9-8.

of such changes on the working of the state's Motor Vehicle Title Law should be considered. As has been pointed out above, the Title Law at present controls over the Code, has the effect of largely nullifying the "certificated goods" provisions of section 9-103, and substantially modifies the operation of subsections (2) and (3) of that section.[245] If the 1972 amendments are adopted, unless the supremacy of the Title Law is preserved by an explicit saving clause, the provisions of the revised Code will presumably supersede the inconsistent provisions of the Title Law.

There are numerous instances of inconsistency. The Title Law provides that "validity" of security interests in vehicles subject to the Act is to be governed by the law of the jurisdiction where the vehicle was when the security interest attached, except that Mississippi law is to govern if the parties understood at the time of attachment that the vehicle was to be brought into the state and it was brought into the state within 30 days.[246] Under the revised Code, "validity" of security interests in all collateral is governed either by the law of the jurisdiction selected by the parties to the secured transaction or by the law of the jurisdiction having an "appropriate relation" to the transaction (under section 1-105(1)) or by the law selected by the general conflict of laws rules of the forum.[247]

Under the Title Law continuance of perfection of a security interest in a vehicle brought into the state is dependent on the security interest having been perfected "under the law of the jurisdiction where the vehicle was when the security interest attached."[248] Under Section 9-103 of the revised Code, the rules would vary depending on whether the vehicle was classifiable as "ordinary goods," "mobile goods" or "certificated goods," and under these rules continuance of perfection in the state to which the goods were removed would seldom depend on whether the interest was perfected under the law of the jurisdiction where the vehicle was at the time the interest attached.[249]

Under the Title Law if a vehicle is brought into the state subject to a security interest perfected under the law of the jurisdiction where the vehicle was when the security interest attached and "the name of the lienholder is shown on an existing certificate of title issued by that jurisdiction his security interest continues perfected in this state," ap-

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[245]See text accompanying notes 73 through 76 *supra*.

[246]See text accompanying notes 77 through 83 *supra*.

[247]See text following note 132 *supra*.

[248]See quotation in text accompanying note 84 *supra*.

[249]It would be so only where the goods were "ordinary goods" and the final event necessary for attachment was also the final event necessary for perfection. See text accompanying notes 155 through 167 *supra*.

parently without time limit.[250] The question has previously been considered (but not resolved) whether this rule is limited to cases where the certificate was issued under an "exclusive" certificate of title act or applies regardless of whether the title act under which it was issued requires that a security interest be shown on the certificate as a condition of perfection.[251] Given either reading the Title Law differs from the 1972 version of the U.C.C. Insofar as certificates issued under "exclusive" certificate of title acts are concerned: (1) the Code would end the period of automatically continued perfection in Mississippi when the certificate was surrendered;[252] (2) the Code would also end that period when the vehicle had been in the state for at least 4 months and it was registered in Mississippi.[253] Insofar as "non-exclusive" certificate of title acts are concerned, the Code would not treat the listing of the security interest on the certificate as important for purposes of continuing automatic perfection in Mississippi.[254]

Under the Title Law if a vehicle is brought into the state subject to a security interest perfected under the law of the jurisdiction where the vehicle was when the security interest attached but "the name of the lienholder is not shown on an existing certificate of title issued by that jurisdiction," the perfection continues in Mississippi "for four (4) months after a first certificate of title is issued in this state, and also thereafter if within the four month period it is perfected in this state."[255] The difficulties presented by this passage have been explored above,[256] and that discussion will not be repeated here. It is sufficient to note the following points of clear or arguable inconsistency with the 1972 Official Text of the Code:

> (1) Under the Code if the vehicle is "mobile goods," the law of the state of the debtor's location governs perfection. This may have the effect of giving the secured party an automatically continued perfection in Mississippi for considerably longer than the Title Law would, or the period may be shorter, but in any event it is not tied to a 4-month rule at all, except where the debtor's location changes.
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> (2) If the vehicle is "ordinary goods" the Code would provide a 4-month rule for continued perfection, but:

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[250]Note 248 *supra*.

[251]See text following note 85 *supra*.

[252]This may be implicit in the Mississippi Title Law.

[253]See part II. B. 1. c. (2)(b) *supra*.

[254]The vehicle would not be "covered by a certificate of title" within the meaning of subsection (2) of section 9-103. The rules of subsection (1) or subsection (3) would govern the perfected status of the security interest in Mississippi.

[255]See note 84 *supra*.

[256]See text following note 84 *supra*.

(a) The period could be reduced by reason of termination of the perfection earlier under the law of the state where perfection was originally achieved (apparently not so under the Title Law); and

(b) The four-month period begins to run from the time the vehicle is brought into the state, rather than from the time a first certificate of title is issued in Mississippi.

(3) If perfection is not renewed under Mississippi law before the end of the grace period allowed by the Code's 4-month rule, the Act is explicit that the loss of perfection is to be deemed retroactive to the time the vehicle was brought into the state in favor of persons who purchased interests in the vehicle during the grace period, while the Title Law is silent on the question whether the loss of perfection is to be treated as retroactive.

There is, then, an initial policy decision to be made as to whether it is preferable to have the rules of the 1972 Official Text of the U.C.C. or those of the Title Law control the matter of continuance of perfection in Mississippi of security interests perfected elsewhere before the vehicle was brought into Mississippi. In the interest of promoting the Code's goal of national uniformity of the law of commercial transactions,[257] the former seems the better choice, and the difficulties of interpretation and application of the Title Law reinforce the argument.

If the Code rules are allowed to supersede those of the Title Law which are in conflict, attention should be given also to how the Title Law would fit into the pattern of Code rules. The main point to be kept in mind is that the Mississippi Title Law is not (it is believed) an act of the type to which paragraph (2)(a) of revised section 9-103 refers; *i.e.*, it is not an act under which "indication of a security interest on the certificate is required as a condition of perfection."[258] Hence a vehicle for which a Mississippi certificate of title has been issued is not "covered by a certificate of title" within the meaning of subsection (2). This phenomenon will have significance both when a vehicle is brought into Mississippi already subject to a security interest and when a vehicle is taken from Mississippi to another state in which the 1972 Official Text of the Code is in force.

Assume that a vehicle is brought into Mississippi subject to a perfected security interest. If the interest was perfected by notation of the interest on a certificate of title, subsection (2)(b) will continue the

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[257]Section 1-102(2)(c) of both the 1962 and the 1972 Official Texts declares that one of the "[u]nderlying purposes and policies of this Act" is "to make uniform the law among the various jurisdictions."

[258]See text accompanying notes 95 through 98 *supra*.

perfection in Mississippi until the outstanding certificate is surrendered or, if it is not surrendered, for 4 months and until the vehicle is registered in Mississippi. During this period a non-professional buyer who buys in ignorance of the security interest in reliance on a Mississippi certificate of title which neither shows the security interest nor warns of the possible existence of undisclosed security interests will not be protected by the rule of paragraph (2)(d), because that rule presumably refers to a certificate of title of the type described in paragraph (2)(a). After the law of the state that issued the original certificate ceases to control perfection, subsection (2) will have no application, whether or not Mississippi has issued a certificate of title and whether or not the security interest is shown on any certificate that has been issued. If the vehicle is "ordinary goods," subsection (1)'s last-event rule should make Mississippi's Title Law controlling as to perfection. If the vehicle is "mobile goods," Mississippi's Title Law will control perfection if the debtor is located in Mississippi; otherwise, the law of the state where the debtor is located will govern perfection.

If the security interest was perfected otherwise than by notation on a certificate of title, subsection (2) will have no application to security interests in the vehicle, regardless of the existence and terms of any Mississippi certificate of title. The rules as to what law applies will be those of subsection (1) or subsection (3). The protection of non-professional buyers afforded by paragraph (2)(d) will not be available to buyers relying on a Mississippi title certificate.

In a case where a security interest has been perfected *in* Mississippi under the Title Law, and the vehicle is then taken to another state, the law of the latter state (assuming the 1972 Official Text of the Code to be in force there) will presumably not treat the vehicle as "covered by a certificate of title" under subsection (2) of its section 9-103 and hence none of the rules of that subsection will apply unless and until *that* state issues a certificate of title of the type described in paragraph (2)(a). If the vehicle is "ordinary goods," the perfection achieved in Mississippi will be temporarily continued in the other state under the 4-month rule of that state's section 9-103(1)(d). If the vehicle is "mobile goods" *and* Mississippi is the state in which the debtor is located, Mississippi's Title Law will continue to control the perfected status of the security interest indefinitely unless the debtor's location changes or that state issues a certificate of title of the type described in paragraph (2)(a) of section 9-103. If the vehicle is "mobile goods" and the debtor is *not* located in Mississippi, Mississippi's Title Law will never have controlled perfection of the security interest, for subsection (3) of the Mississippi U.C.C. will have relinquished jurisdiction over security interests in the vehicle to the state of the debtor's location, and that law would continue to control perfection of the security interest in the state to which the vehicle was moved.

These effects suggest the desirability of modification of the perfection rules of the Mississippi Motor Vehicle Title Law to qualify Mississippi title certificates for recognition under subsection (2) of the revised Code. At least two substantial benefits would accrue:

> (1) In cases where vehicles were brought into the state subject to perfected security interests, innocent nonprofessional buyers buying during the periods of automatically continued perfection granted by paragraphs (2)(b) or (1)(d) of U.C.C. Section 9-103 would have the protection of the rule of paragraph (2)(d) if Mississippi had issued a certificate of title neither showing the security interest nor warning of the possible existence of undisclosed security interests.
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> (2) In cases where secured parties acquired security interests in vehicles located in Mississippi, they could be assured of perfection by obtaining Mississippi title certificates showing their interests, regardless of whether the vehicles were consumer goods, equipment or inventory and regardless of the locations of the debtors. Furthermore, they could be assured that, as long as they held on to their certificates, their security interests would continue perfected even after removal of the collateral to other Code states for a minimum of 4 months and quite possibly longer.

e. *Minerals.* Subsection (5) of revised section 9-103 provides a specialized rule for a special situation, involving "minerals or the like (including oil and gas)." Minerals in the ground are generally assumed by Article 9 to be real property, in which there can be no Code security interest (although there could be if the local law of any state treated them as personal property before severance).[259] When extracted, miner-

[259]Section 9-102(1) of both the 1962 and the 1972 Official Texts limits the scope of Article 9 to security interests in "personal property or fixtures," and in both versions section 9-104(j) provides that, "This Article does not apply . . . except to the extent that provision is made for fixtures in Section 9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder." While the 1962 Text's definition of "goods" does not make specific reference to minerals (section 9-105(1)(f)), paragraph (2)(b) of section 9-204 appears to exclude them from Code coverage prior to extraction by providing that, "[f]or purposes of this section [which is primarily concerned with when a Code security interest attaches, and which requires that the debtor have rights in the collateral in order for attachment to occur] the debtor has no rights . . . in oil, gas or minerals until they are extracted . . ."; the 1972 definition of "goods" in section 9-105(1)(h) specifically excludes "minerals or the like (including oil and gas) before extraction." The Comment to revised section 9-105 asserts that, "[i]f in any state minerals before severance are deemed to be personal property, they fall . . . in the catch-all definition, 'general intangibles,' in Section 9-106." 1972 OFFICIAL TEXT WITH COMMENTS § 9-105, Comment 3.

als become "goods,"[260] and a Code security interest in them can arise. If a secured party holds a real estate mortgage on the minerals before they are extracted and the mortgage provides for continuance of the security interest in the minerals after their extraction, a problem could arise as to where a financing statement should be filed to perfect the security interest in the minerals as goods. They would presumably be treated as "ordinary goods," and in the absence of any special rule would fall under subsection (1) of section 9-103, perfection and the effect of perfection or non-perfection being governed by "the law of the jurisdiction where the last event occurred on which is based the assertion that the security interest is perfected or unperfected." Subsection (5) takes the case out of subsection (1), by providing that the applicable law is that of the "jurisdiction where the wellhead or minehead is located."[261]

The rule serves to eliminate problems of determining the location of the minerals at the moment they become goods and could be subject to a perfected Code security interest. One might suppose a case of coal being mined underground in State A and transported through tunnels to a minehead in State B. If the last-event rule of subsection (1) applies and the holder of the real estate mortgage (*C-1*) had filed a financing statement in State B, but another secured creditor of the debtor (*C-2*) had filed in State A, assuming that each had already given value and each had a written security agreement, the critical qustion in deciding which of the secured parties had priority might well be where the coal was located at the moment it became goods. If that was in State A, *C-2* could argue (presumably successfully) that the "last event" necessary for his perfection was the debtor's acquisition of rights in the coal *as goods*; since the goods were then located in State A, and *C-2* had filed there, and since all other events essential for perfection had already occurred, he acquired a perfected security interest at that time; *C-1*, on the other hand, would not have acquired a perfected security interest at that time because all of the events necessary for perfection of his security interest under the law of State A had not occurred; and, as was noted above, it is not clear that *C-1* would acquire a perfected interest in the coal even when it was brought into State B unless a new filing were then made in State B.[262] However, if the coal became goods in State B, it would be clear that *C-2* would not have a perfected interest in it unless and until he filed in State B, while *C-1*'s interest would be perfected as soon as the coal became goods. The rule of section 9-103(5)

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[260]Implied by sections 9-105(1)(f) and 9-204(2)(b) of the 1962 Official Text, and by Section 9-105(1)(h) of the 1972 Official Text. *See also* OFFICIAL TEXT WITH COMMENTS, *supra* note 259.

[261]The subsection is quoted in the text following note 274 *infra*.

[262]See text following note 167 *supra*.

eliminates this sort of problem by selecting State B as the appropriate state for filing for both *C-1* and *C-2*.

The problem just discussed does not appear to have been the principal concern of the draftsmen motivating their inclusion of subsection (5) in revised section 9-103. Their attention was primarily directed to resolution of difficulties that could arise if the minerals were sold at the moment of extraction and the security interest shifted to resulting accounts.[263] This aspect of the subsection will be considered below, in the discussion of intangibles.

2. Intangibles

a. *Pure Intangibles.* The handling of choice-of-law questions affecting security interests in "pure intangibles" in the 1972 Official Text of the U.C.C. has been somewhat simplified by a decision to reduce the categories of such collateral from three to two throughout Article 9. The term "contract right" is dropped and all "pure intangibles" are now either "accounts" or "general intangibles." The Review Committee's explanation is that there is only one provision in the 1962 Official Text where the distinction between "contract rights" and "accounts" is intended to make a difference in results, section 9-318(2) (dealing with the power of the parties to a contract to modify it after assignment of rights arising from it), and the Committee found it possible to preserve the distinction in that subsection without using the term "contract right"; on the other hand, abolition of the term and revision of the definition of "account" made it possible to eliminate traps for the unwary in the filing of financing statements and to avoid certain "proceeds" problems and priority questions which could arise under the 1962 Text.[264]

Section 9-106 of the revised Code defines "account" as meaning "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not earned by performance." All other "pure intangibles" are "general intangibles."[265] The effect of this redefinition is to convert some rights

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[263]Most of the commentary on subsection (5) deals with the "accounts" problem. *See* 1972 Official Text with Comments § 9-103, Comment 8; Review Committee Final Report 211-12, item D-3; Funk, *supra* note 40, at 322. Coogan, *supra* note 144, at 555; 48 ALI Proceedings 280-82 (remarks of Professor Kripke) (1971).

[264]Review Committee Final Report 214-15, items E-8 to E-10. See text accompanying notes 123 through 126 *supra*.

[265]The definition of "general intangibles" has been modified to exclude "money" from the category, and section 9-106 specifically classifies "rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract" as "accounts." "General intangibles" remains the catch-all term, into which collateral falls which does not fit the definition of "goods" or any of the definitions of the other four classes of intangibles.

which would be "contract rights" under the 1962 Text into "accounts" and others into "general intangibles." To be an "account" under the 1972 Text an unearned right to payment must arise from a contract for the sale or lease of goods or a contract for services; unearned rights to payment under other contracts are "general intangibles." A right to repayment of money lent or to be loaned, for example, would be a "general intangible," not an "account."[266]

In revised section 9-103's pattern of choice-of-law rules, with one exception, all "pure intangible" collateral is governed by subsection (3), and the applicable rules are, with one exception, the same as those applicable to "mobile goods" collateral.

The 1972 Text thus eliminates the strains produced by the 1962 Text in its selection of the law applicable to security interests in accounts and contract rights on the basis of the location of "the office where the assignor . . . keeps his records concerning them," but referring to the jurisdiction where the "chief place of business" of the debtor is located for the law governing security interests in general intangibles.[267] Perfection of security interests in virtually all "pure intangible" forms of collateral is now governed by the law of the jurisdiction where the debtor is located, and filing to perfect a security interest in either accounts or general intangibles or both can be made in the same place, simplifying the problems of both the secured party wondering where to file and prospective creditors of the debtor wondering where to search.[268]

Revised subsection (3) works a bit differently where the collateral is accounts or general intangibles than where "mobile goods" form the collateral, but only in cases falling within paragraph (c), where the "debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction." It will be recalled that in the case of "mobile goods" paragraph (3)(c) refers to "the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States" for rules governing "perfection and the effect of perfection or non-perfection of the security interest through filing."[269] The same rule applies where the collateral is accounts or general intangibles, but in such case the paragraph provides an alternative rule that "if the debtor is located in a jurisdiction which is not a part of

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[266]The Review Committee considered classifying rights to the repayment of money as "accounts" but decided not to "upset a terminology which a good many people rely on any more than we have to." 48 ALI PROCEEDINGS 275 (remarks of Justice Braucher) (1971). *See also* REVIEW COMMITTEE FINAL REPORT 216-17, item E-15.

[267]See text accompanying notes 121 through 126 *supra*.

[268]*See* 1972 OFFICIAL TEXT WITH COMMENTS Appendix, § 9-103, Reasons for Change, 3.

[269]See text accompanying notes 213 through 215 *supra*.

the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor."

This rule appears to be drawn from the optional subsection (5) of Section 9-103 of the 1962 Official Text,[270] although it is no longer optional and it differs from the 1962 Text in a number of details. No explanation has been found for the retention of the device of notification to the "account debtor,"[271] even as an alternative means of perfection, in this situation, when the Code does not otherwise allow perfection in this manner. It is possible that the explanation is simply that the general approach of the Review Committee was to make changes only where the 1962 Official Text had produced serious problems, reflected in nonuniform amendments or substantial demand for change;[272] section 9-103(5) of that text has been subjected to little nonuniform amendment[273] and appears to have aroused little criticism. It should be noted, however, that the rule, as it appears in the 1972 Text, has been subjected to some tinkering, and that 14 states (including Mississippi) have not included the rule in their Codes.[274]

The one type of "pure intangible" collateral not governed by subsection (3) of revised section 9-103 is an account arising from the sale of minerals at the wellhead or minehead, where the account is subject to a security interest which attaches as a continuation of a prior interest in the minerals themselves prior to their extraction. Subsection (5) provides:

> Perfection and the effect of perfection or non-perfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located.

The principal reason for providing a special choice-of-law rule for

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[270]See text accompanying notes 118 & 119 *supra*.

[271]"Account debtor" is defined in the 1972 Official Text, section 9-105(1) (a), as "the person who is obligated on an account, chattel paper or general intangible." The definition differs from that of the 1962 Official Text only by eliminating a reference to "contract right."

[272]REVIEW COMMITTEE FINAL REPORT 196. The Committee comment states also that "the Committee has eschewed amendment merely for the sake of theoretical improvement." *Id.*

[273]Only New York has changed it. 3 UNIFORM LAWS ANNOTATED § 9-103, at 35 (Master ed. 1968). The Committee considered, but rejected, the New York variation. REVIEW COMMITTEE FINAL REPORT 234, item F-18.

[274]3 UNIFORM LAWS ANNOTATED § 9-103, at 34 (Master ed. 1968).

security interests in such accounts is that rights in minerals in the ground, particularly oil and gas, are often split into a large variety of interests, and the interested persons may be scattered widely across the country. If the minerals are sold as they are extracted and a security interest attaches to the resulting accounts (*i.e.*, the rights to payment for the minerals) the rule of subsection (3) would require filing in the states where the debtors were located to perfect the security interest. That would present troublesome problems for the secured party. The rule of subsection (5) of revised section 9-103 makes filing in a single jurisdiction possible. The selection of the jurisdiction where the well-head or minehead is located conforms to pre-Code practice (and apparently to the practice secured parties have continued to follow under the earlier drafts of the Code).[275]

b. *Semi-tangibles.* The three classes of "semi-tangibles"—instruments, documents and chattel paper—probably not dealt with in the 1962 version of section 9-103 at all,[276] are explicitly brought within the coverage of revised section 9-103.

(1) *Instruments and Documents.* Instruments[277] and documents[278] are covered by subsection (1) and are subject to nearly the same choice-of-law rules as "ordinary goods." The last-event rule of paragraph (1)(b) generally determines the law applicable to perfection and the effect of perfection or nonperfection of security interests in such collateral, and the 4-month rule of paragraph (1)(d) modifies the general rule as in the case of "ordinary goods." There is, however, no provision for variation of the last-event rule in cases where, at the time the security interest attaches, the parties understand that the instruments or documents are to be taken to another jurisdiction, as paragraph (1)(c)[279] is expressly

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[275]*See* 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 8; REVIEW COMMITTEE FINAL REPORT 211-12, D-3; 48 ALI PROCEEDINGS, 280-81 (remarks of Professor Kripke) (1971).

[276]See text accompanying note 127 *supra.*

[277]The definition of "instrument" in the 1972 Official Text (section 9-105(1)(i)) is the same as that of the 1962 Official Text (section 9-105(1)(g)), quoted in note 103 *supra.*

[278]The definition of "document" in the 1972 Official Text (section 9-105(1)(f)) amplifies that of the 1962 Official Text (section 9-105(1)(e), quoted in note 104 *supra*) to include "a receipt of the kind described in subsection (2) of Section 7-201." The subsection referred to, unchanged by the 1972 amendments, provides: "Where goods including distilled spirits and agricultural commodities are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods has like effect as a warehouse receipt even though issued by a person who is the owner of the goods and is not a warehouseman." The change in the Article 9 definition of "document" corrects an oversight in the 1962 Text. REVIEW COMMITTEE FINAL REPORT 242, item H-2.

[279]Quoted and discussed in the text following note 169 *supra.*

limited to cases involving security interests in "goods."

Since the proper place to file in order to perfect a security interest is the matter most likely to present need for choice of law, and security interests in instruments cannot be perfected by filing,[280] instruments will presumably seldom raise choice-of-law questions.[281]

(2) *Chattel paper.* The Review Committee considered chattel paper[282] to require special treatment. Subsection (4) of section 9-103 provides:

> The rules stated for goods in subsection (1) apply to a possessory security interest in chattel paper. The rules stated for accounts in subsection (3) apply to a non-possessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.

The Official Comment suggests that the reason for this special treatment of chattel paper is that under the Code perfection of a security interest in such collateral may be achieved either by taking possession of the collateral or by filing.[283] That seems an inadequate explanation because perfection of a security interest in goods collateral can normally be achieved either way as well. The Review Committee Final Report goes a bit further, explaining that the principal problem, in the case of filing to perfect a security interest, is selection of the jurisdiction in which to file, and that location of the collateral is an unsatisfactory test where chattel paper is involved "because the paper's location is not visible to a prospective searcher for filings, it is readily transportable, and there may be more than one executed copy of the chattel paper."[284] It seemed to the Committee that where perfection was by filing, the problem was "essentially similar to that applicable to accounts and general intangibles,"[285] so the location-of-debtor test was chosen as the

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[280] 1972 OFFICIAL TEXT WITH COMMENTS §§ 9-304(1), (4), (5), 9-306(2), (3). The same is true under the 1962 Official Text.

[281] Funk, *supra* note 40, at 340-41.

[282] The definition of "chattel paper" in the 1972 Official Text (section 9-105(1)(b)) is essentially unchanged from that of the 1962 Official Text, as modified by the 1966 amendment (see note 105 *supra*), except that the exclusion of ship charters from the definition of "chattel paper" is no longer treated as optional. Ship charters are excluded from this category and treated as "accounts" (revised section 9-106) to avoid the possibility of their being pledged as a method of perfection. Such contracts are often issued in multiple originals, and if they were treated as pledgeable, opportunities for fraud would be too great. This has not eliminated all possibilities of fraud in connection with pledges of chattel paper, however, as some writings which do qualify as "chattel paper" are issued in duplicate or multiple copies. 48 ALI PROCEEDINGS 279 (remarks of Justice Braucher) (1971).

[283] 1972 OFFICIAL TEXT WITH COMMENTS § 9-103, Comment 6.

[284] REVIEW COMMITTEE FINAL REPORT 233, item F-14.

[285] *Id.* at 233, item F-15.

means of selecting the law governing perfection and fixing the place to file.

Where perfection of a security interest in chattel paper is sought to be achieved by possession of the paper, however, a method of perfection not available where the collateral is accounts or general intangibles, the Committee felt that the location of the collateral *should* control selection of the law governing perfection because "there are frequently local transactions between a local unit of a debtor and a local financer, and in that event the governing considerations should not be referred to the law of a possibly remote jurisdiction where the chief executive office of the debtor might be."[286]

In view of this explanation, one wonders why negotiable documents are not handled the same way, since under the 1972 Official Text (as well as under the 1962 Text) a security interest in a negotiable document may be perfected by either filing or possession.[287] Mr. Coogan has expressed the hope that "an informed court" will treat security interests in negotiable documents like those in chattel paper,[288] but the specific reference to "documents" in section 9-103(1) of the revised text does not encourage that reading.

3. Money

Whether money is a tangible or an intangible under the 1972 Official Text is uncertain.[289] The definition of "goods" in section 9-105(1)(h) provides that the term "does not include money" (as does the 1962 definition). The definition of "general intangibles" in section 9-106 (unlike that of the 1962 Text) also expressly excludes "money." Since money could not be fitted into the definitions of "account," "document" or "chattel paper," it fits into the Article 9 breakdown of kinds of collateral only if it is an "instrument" or "instruments," and the definition of "instrument" in section 9-105(1)(i) applies only to an Article 3 negotiable instrument, an Article 8 investment security, or some "other writing *which evidences a right to the payment of money* and [which] is

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[286]*Id.* Where perfection is sought to be achieved by taking possession of the collateral, it would seem that choice of law would seldom be an important problem. Only in non-Code jurisdictions would there be likely to be any question whether the security interest *could* be perfected by possession, and possession would naturally have to be taken, and maintained, in whatever jurisdiction the chattel paper was. It is possible that the law of one jurisdiction might differ from that of another as to what constitutes "possession," as where an employee of the debtor holds the paper on the debtor's own premises, purportedly as agent for the secured party, and choice of law could be critical there. *See* Funk, *supra* note 40, at 345.

[287]§§ 9-304(1), 9-305, both versions.

[288]Coogan, note 144 *supra*, at 554-55.

[289]Compare treatment in the 1962 Official Text, discussed in note 109 *supra*.

not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement." (Emphasis supplied.) Since "money" is broadly defined in section 1-201(24) as "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency," some forms of money, if not most, would surely fall outside the definition of "instrument." Yet Article 9 clearly contemplates that money may serve as collateral for a security interest, in sections 9-304(1), 9-305, and 9-306(1).

Money, at least in some forms, then, appears to be an independent class of collateral,[290] for which section 9-103 provides no choice-of-law rule, and choice of law would have to be made under the general provisions of section 1-105(1). However, choice of applicable law would probably seldom be critical under the revised Code, for sections 9-304(1) and 9-305 make it clear that a security interest in money can be perfected only by taking possession, except where the money is proceeds of other collateral or proceeds (covered by section 9-306). Money is thus treated much like instruments.[291]

III. Conclusion

This lengthy analysis of the conflict of laws provisions of the 1972 Official Text of the Uniform Commercial Code, as compared with the 1962 Official Text and as it would affect Mississippi law if adopted in Mississippi, at least demonstrates the many-faceted nature of the subject and suggests the extreme difficulty of drafting satisfactory legislative solutions to all the problems involved. The 1972 Official Text, this writer believes, addresses itself to most of the ambiguities, omissions and inconsistencies of the earlier text which have aroused serious controversy or criticism and offers solutions which, on the whole, should be workable and yield satisfying results in the majority of cases. While it leaves some issues unanswered and, indeed, creates a few new ones, the enactment of the 1972 amendments in Mississippi would produce a net improvement in the law.

A serious problem peculiar to Mississippi is that of the relation between the revised Code's conflict of laws rules and those of the Mississippi Motor Vehicle Title Law. To the writer, the Code rules appear clearer, and their adoption, as controlling over those of the Title Law,

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[290]Unless the reasoning of the *Zuke* case, cited in note 109 *supra*, be adopted, that money is "goods" when treated as a commodity rather than as a medium of exchange.

[291]The provisions of sections 9-304(4) and (5) for temporary perfection of a security interest in "instruments" without either filing or possession do not, however, expressly apply to "money" and are presumably inapplicable to any money that does not fit the definition of "instrument." *Cf.* Funk, note 40 *supra*, at 327.

is desirable to promote the end of national uniformity in the law of commercial transactions. To get the full benefit of the Code's rules, however, amendment of the Title Law seems desirable so as to qualify Mississippi certificates of title for recognition under subsection (2) of Section 9-103 of the U.C.C.

ZONING LAW IN MISSISSIPPI

*Robert C. Khayat*and David L. Reynolds***

The most recent definitive article published in this Journal concerning the status of zoning in Mississippi appeared in 1960.[1] Since that time, land development, urbanization, federal assistance programs, and an increasing awareness of the need to plan and regulate growth have encouraged municipalities and counties throughout the state to enact zoning ordinances. Evidence of this activity is reflected in the number of zoning cases decided by the Mississippi Supreme Court since 1960. Prior to that time the court had decided only 19 zoning cases; since 1960, 55 zoning cases have been decided. It was therefore determined that a zoning article was timely.

The scope of this article was intentionally limited to a consideration of the current status of the major areas of zoning law in Mississippi. A conscious effort was made to be brief without being cryptic since our objective is to present a clear and concise statement that hopefully will be a useful aid to the practitioner. Occasional suggestions for legislative action or judicial clarification are made but are merely secondary considerations in view of the principal objective of this article. No attempt will be made to offer a panacea to the myriad problems found in the area of land use regulation.

I. Historical Background

Although land use regulation has traditionally been a function of government, comprehensive zoning as we know it today is a product of the 20th century.[2] Modern zoning was first introduced in this country by the City of New York in 1916.[3] By 1926 the United States Supreme

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[1]Walker, *Legal Status of Zoning in Mississippi,* 32 Miss. L.J. 256 (1961). Other writings concerning zoning which have been published in the Journal are: Comment, 41 Miss. L.J. 271 (1970); Note, 41 Miss. L.J. 154 (1969).

[2]D. Hagman, Urban Planning and Land Development Control Law §§ 28-29 (1971); C. Rhyne, Municipal Law § 32-1 (1957).

[3]Although earlier attempts at zoning had been upheld in Boston (1908) and Los Angeles (1909), New York enacted the first comprehensive zoning ordinance, which was upheld in Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920). The ordinance "was comprehensive in the senses that it covered all but 'unrestricted' or 'undetermined' zones of the city, and it classified uses and created zones for all uses, which zones were then mapped. . . . The ordinance [also] included height and bulk controls

Court had decided that governmental regulation of land use did not deprive landowners of their constitutionally protected rights, but was a valid exercise of the police power.[1] Following the landmark decision in *Village of Euclid v. Ambler Realty Co.*[5] the Court established broad boundaries within which local governments could properly regulate land use.[6] One may conclude from the cases that zoning ordinances will be adjudged valid unless (1) the local governing body has failed to comply with the statutory requirements for enactment and implementation of the ordinance or (2) the ordinance is unconstitutional on its face or as applied.[7] Since 1928 the Court has refused to hear zoning cases, apparently of the opinion that all constitutional questions have been adequately answered and that state courts are more adept at adjudication of these conflicts.[8]

Prior to *Euclid*, and for some time thereafter, the Mississippi Supreme Court was reluctant to recognize zoning as a proper exercise of the police power.[9] However, in the 1932 case of *City of Jackson v. McPherson*,[10] Justice Griffith eloquently brought Mississippi in line with *Euclid* by recognizing compelling social and economic reasons justifying zoning. Evidencing extraordinary foresight by anticipating that urbanization would be accompanied by increasing conflicts between rights incident to land ownership and the public welfare, Justice Griffith bridged the gap between pre-*Euclid* attitudes and modern socio-legal thought. In characteristically classic style he said:

> When our Constitutions were made and all the treasured constitutional rights expressed therein were secured, it was [*sic*] the product of a population which was rural; the inspiration was from the rural

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. . . ." D. HAGMAN, *supra* note 2, § 28.

[4]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[5]*Id.*

[6]Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (prohibiting land use control by neighborhood consent); Nectow v. Cambridge, 277 U.S. 183 (1928) (limiting zoning to promotion of the public good); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927) (upholding exclusion of businesses from residential areas); Gorieb v. Fox, 274 U.S. 603 (1927) (upholding setback provisions).

[7]Cases cited note 6 *supra*.

[8]D. HAGMAN, *supra* note 2, at § 29. The Court has abstained even when the purpose of the zoning appears to have been racial discrimination. In Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), the court of appeals allowed a referendum on a zoning ordinance which would have allowed multiple-family public housing in a previously all-white, single-family dwelling neighborhood. The Supreme Court refused to hear the case. *See* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

[9]Dart v. City of Gulfport, 147 Miss. 534, 113 So. 441 (1927); Fitzhugh v. City of Jackson, 132 Miss. 585, 97 So. 190 (1923).

[10]162 Miss. 164, 138 So. 604 (1932).

> home and from the prevailing rural life, wherein the home was the center of affection and interest. If the conditions which gave origin to Constitutions and have thus far preserved them should be permitted to be taken substantially out of the lives of those who are henceforward to constitute the majority of the people, then we might well look upon the future with apprehension. It is therefore a consideration of supreme importance to state and nation that the home and desirable home surroundings in cities and large towns shall be preserved and made permanently secure. It is too much to expect, or at least it is a dangerous experiment to suppose, that that profound and dependable patriotism which is necessary to preserve and maintain an ideal government like ours could survive the lapse of time crowded into apartments and tenements, where the children for generation after generation shall have no place to develop except in the immediate environments of commerce and in the clangor of factories. We need not elaborate upon considerations so distinctly vital; we merely introduce this as among those in the mature view of which we have no hesitancy in declaring that those reasonable regulations which will preserve the home from intrusion and will secure its permanency is [*sic*] within the legitimate field of the police power of the state; and that zoning laws, such as those now in the statute books of the state, to that end, are valid. And it is only a completion, a complement of the plan, that these laws shall reasonably permit at the same time a further zoning into separate commercial and industrial areas.[11]

Guided since 1932 by the *McPherson* philosophy, our court has developed a substantial body of zoning law.[12]

II. Enacting the Ordinance

As a creature of the state, the local government derives its zoning power from the legislature.[13] The power is not mandatory, but should the local government elect to enact a zoning ordinance, strict adherence to the statutory requirements for enactment is essential.[14] The requirements for valid enactment of a comprehensive zoning ordinance are: (1) development of a comprehensive plan;[15] (2) notice of a public hearing to consider the ordinance;[16] (3) the hearing;[17] and (4) adoption of the ordinance.[18]

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[11]*Id.* at 176, 138 So. at 605.

[12]Since 1932 the Mississippi Supreme Court has decided 74 zoning cases.

[13]*See, e.g.*, City of Jackson v. Freeman-Howie, Inc., 239 Miss. 84, 121 So. 2d 120 (1960).

[14]*See, e.g.*, Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958); Walker v. City of Biloxi, 229 Miss. 890, 92 So. 2d 227 (1957); Brooks v. City of Jackson, 211 Miss. 246, 51 So. 2d 274 (1951).

[15]Miss. Code Ann. § 17-1-9 (1972).

[16]*Id.* § 17-1-15.

[17]*Id.*

[18]*Id.* §§ 21-13-1 *et seq.*

A. *The Comprehensive Plan*

The enabling legislation[19] and case law[20] dictate adoption of the plan prior to publication of notice of the hearing. However, neither the legislature nor the courts have defined *comprehensive plan,* and it appears that occasionally the courts have confused *comprehensive plan* with *comprehensive zoning.*[21]

Although there is an understandable tendency to confuse planning and zoning, they are not synonymous. One court has distinguished the terms by saying:

> While planning and zoning are sometimes considered so closely of kin as to constitute a single conception, they do not cover identical fields of municipal endeavor. Although municipal planning embraces zoning, the converse of the proposition does not hold true. They are obviously not interchangeable terms. Zoning may not entirely exclude planning, but it obviously does not embrace planning in its entirety.
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> Zoning is a separation of the municipality into districts, and the regulation of buildings and structures in the districts so created, in accordance with their construction and the nature and extent of their use. This is the constitutional concept of the term. It is the dedication of the districts delimited to particular uses designed to subserve the general welfare. It pertains not only to use but to the structural and architectural design of buildings.
>
> Planning, on the other hand, is a term of broader significance. It connotes a systematic development contrived to promote the common interest in matters that have from the earliest times been considered as embraced within the police power.[22]

In the absence of explicit direction from the legislature, local governments have had to rely on planners or laymen to define and produce comprehensive plans.[23] The Standard City Planning Enabling Act,[24]

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[19]*Id.* § 17-1-9.

[20]*E.g.,* Walker v. City of Biloxi, 229 Miss. 890, 92 So. 2d 227 (1957); Morris v. City of Columbia, 184 Miss. 342, 186 So. 292 (1939).

[21]*E.g.,* Ridgewood Land Co. v. Simmons, 243 Miss. 236, 137 So. 2d 532 (1962), in which the court stated:

> We are of the opinion that although a zoning ordinance or an amendment creates in the center of a large zone a small area or a district devoted to a different use, it is not spot zoning if it is enacted in acordance with a *comprehensive zoning plan.* There is no doubt in this case that the area covered by the overall plan is a large and *comprehensive plan* covering many areas, and that rezoning of the area involved is done because of the changed conditions and surroundings in the overall *plan.*

Id. at 251-52, 137 So. 2d at 538 (emphasis added).

[22]Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 198 A. 225, 228 (1938) (citations omitted).

[23]MISS. CODE ANN. § 17-1-11 (1972), permits establishment of a local planning commission:

describes the comprehensive plan as follows:

> The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development; including, among other things, adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements.[25]

The comprehensive plan should be the product of extensive fact gathering and data collection by professional consultants or by citizens of the local community.[26]

B. Notice of Public Hearing

> [N]o such regulation, restriction or boundary shall become effective until after a public hearing, in relation thereto, at which parties in interest, and citizens, shall have an opportunity to be heard. At least 15 days notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality or county.[27]

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with authority to prepare and propose (1) a master plan of physical development of the municipality or county, or part thereof; (2) a proposed zoning ordinance and map; (3) regulations governing subdivisions of land; (4) building or set back lines on roads and highways; and (5) recommendations from time to time to the governing authorities of each municipality or county with regard to the enforcement of and amendments to the proposals of the planning commission and resolutions or zoning ordinances of such authorities.

The governing authority of each municipality and county may adopt, amend and enforce the proposal of the local planning commission, in whole or in part after a public hearing thereon. . . .

Note that the Mississippi Supreme Court has held that the local governing authority may reject the recommendations of the planning commission. City of Jackson v. Sheppard Inv. Co., 185 So. 2d 675 (Miss. 1966); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966); Sanderson v. City of Hattiesburg, 249 Miss. 656, 163 So. 2d 739 (1964).

[24]STANDARD CITY PLANNING ENABLING ACT § 7, *cited in* D. HAGMAN, *supra* note 2, at § 21.

[25]*Id. See generally* C. RHYNE, *supra* note 2, at § 32-1 *et seq.*; Harr *"In Accordance with a Comprehensive Plan,"* 68 HARV. L. REV. 1154 (1955).

[26]MISS. CODE ANN. § 17-1-11 (1972). For a concise compilation of the statutes and cases related to planning and zoning in Mississippi, see J. YATES, MISSISSIPPI PLANNING LAW DIGEST (1971).

[27]MISS. CODE ANN. § 17-1-15 (1972).

The notice requirement embodied in the zoning enabling legislation clearly reflects legislative awareness of the importance of the ownership and use of property. Although the courts have universally held that the public welfare is best served by orderly land use development,[28] and that reasonable exercise of the zoning power does not constitute a taking within the meaning of the Federal and State Constitutions,[29] they do require that landowners and persons affected by zoning be afforded a hearing and that adequate notice of the hearing be given.[30] "[T]he purpose of the notice requirement is to alert landowners to a potential hazard to their property interests and a notice which fails fairly to do this is defective."[31]

Our statute provides some guidance with respect to form and content of the notice, but it has been necessary for the court to supplement the statutory language.[32] In *Brooks v. City of Jackson*,[33] where the notice failed to name the municipality, the notice was declared infirm. Although the publication was a statewide newspaper, in view of strict construction rules applicable to municipalities,[34] the same result would probably be reached if the publication were distributed locally only. Notice of the hearing is a prerequisite to enactment of a valid zoning ordinance; and such notice must include the name of the municipality or county, the date, time, and location of the hearing, and must be signed by the appropriate governmental officer.[35]

In *Walker v. City of Biloxi*[36] the objector attacked the validity of the ordinance alleging that the city had failed to give the statutory 15 days' notice of the hearing to consider the ordinance. The court, although refusing to accept objector's argument, declared that had timely protest been made this defect would have invalidated the ordinance. It is clear that notice of the hearing must be published at least 15 days prior to

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[28]*E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); City of Jackson v. McPherson, 162 Miss. 164, 138 So. 604 (1932).

[29]U.S. CONST. amend. XIV; MISS. CONST. art. 3, § 17; Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[30]*E.g.*, Gilbert v. Stockton Port Dist., 7 Cal. 2d 384, 60 P.2d 847 (1936); Bell v. Studdard, 220 Ga. 756, 141 S.E.2d 536 (1965).

[31]R. ANDERSON, 1 AMERICAN LAW OF ZONING § 4.14, at 175 (1968).

[32]Ridgewood Land Co. v. Simmons, 243 Miss. 236, 137 So. 2d 532 (1962); Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958); Walker v. City of Biloxi, 229 Miss. 890, 92 So. 2d 227 (1957); Brooks v. City of Jackson, 211 Miss. 246, 51 So. 2d 274 (1951); Arkansas Fuel Oil Co. v. City of Oxford, 188 Miss. 455, 195 So. 316 (1940); Morris v. City of Columbia, 184 Miss. 342, 186 So. 292 (1939).

[33]211 Miss. 246, 51 So. 2d 274 (1951).

[34]*See* C. RHYNE, *supra* note 2, at § 32-5, *cited in* Ridgewood Land Co. v. Simmons, 243 Miss. 236, 137 So. 2d 532 (1962).

[35]Ridgewood Land Co. v. Simmons, 243 Miss. 236, 137 So. 2d 532 (1962).

[36]229 Miss. 890, 92 So. 2d 227 (1957).

the hearing.[37]

In other cases where the validity of the notice has been in issue, the court has held that the statute does not require publication of the zoning map,[38] that objections to defective a notice may be precluded by laches,[39] and that actual notice precludes asserting the invalidity of the notice.[40]

The 1961 decision of *Herbert v. Board of Supervisors*[41] raises some question concerning the necessity of county government compliance with notice requirements. In that case the board of supervisors had by "zoning order or resolution" prohibited the sale of beer and wine in a strip along its county line. The board's action was challenged, *inter alia*, on the basis that no notice was given. The court held "it was not necessary for the Board of Supervisors to give a notice and hearing prior to making a zoning order in a case of this kind."[42] However, this case is probably limited to its facts when read in light of *Ridgewood Land Co. v. Simmons*[43] wherein the court approved strict compliance with the statutory notice rule.

One unanswered issue is whether the proposed ordinance must be published *in toto* with the notice of the hearing. There is disagreement among practitioners on this question. It may be inferred from the holding in *Arkansas Fuel Oil Co. v. City of Oxford*[44] that the entire ordinance must be published prior to the hearing; however, this should not be required since such was probably not within the contemplation of the legislature. The publication expense militates against printing the ordinance in its entirety prior to the hearing. The expense of publication is magnified by the possibility that post-adoption publication is required

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[37]It is unclear, however, whether it is necessary to publish the notice more than one time. Construing a 30-day election notice requirement in the 1953 election case of Neal v. Board of Supervisors, 217 Miss. 102, 63 So. 2d 540 (1953), the court held the governing authority had to publish the first notice of the election at least 30 days prior to the election and again in each successive weekly issue of the newspaper until the date of the election *and* that not more than 7 days should be allowed to intervene between the last publication of the notice and the election. An analogy may be drawn between the election notice and zoning notice, and, therefore, applying the election rule, the notice of the zoning hearing would have to be published three times. It is submitted, however, that the election notice republication rule should not be extended to include the notice required for zoning hearings. *See also* City of Biloxi v. Cawley, 278 So. 2d 389 (Miss. 1973), where the court distinquished annexation ordinances from general ordinances because of their special treatment. This may also apply to zoning ordinances.

[38]Arkansas Fuel Oil Co. v. City of Oxford, 188 Miss. 455, 195 So. 316 (1940).

[39]Walker v. City of Biloxi, 229 Miss. 890, 92 So. 2d 227 (1957).

[40]Ridgewood Land Co. v. Simmons, 243 Miss. 236, 137 So. 2d 532 (1962); Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958).

[41]241 Miss. 223, 130 So. 2d 250 (1961).

[42]*Id.* at 229, 130 So. 2d at 252.

[43]243 Miss. 236, 250, 137 So. 2d 532, 537-38 (1962).

[44]188 Miss. 455, 195 So. 316, (1940).

by the general municipal ordinance statute,[45] though it is unclear whether this applies to zoning ordinances. Assuming that this requirement does apply, it would be necessary to publish the ordinance at least twice.[46] The legislature could solve this problem by utilizing the post-adoption publication procedure authorized for building codes.[47] This procedure sanctions publication of a general notice of adoption which incorporates the building code by reference.

It is suggested that the notice of the hearing to consider the proposed zoning ordinance may best be effected by utilizing general language that will alert all persons possibly affected by the ordinance. The notice of the hearing should state that the proposed ordinance and map are on file and available for inspection during regular office hours. Following enactment, general notice of adoption and availability of the ordinance and map for inspection should be published. This procedure will satisfy due process requirements and substantially diminish publication expenses.

C. *The Hearing*

By statute it is mandatory that the proposed ordinance or any amendment thereto be considered at a public hearing.[48] The purpose of the hearing is to afford "parties in interest and citizens" an opportunity to be heard and to apprise governing authorities of community sentiment. It is noteworthy that it is uncommon for the local legislative body to be required to conduct public hearings prior to enactment of police power ordinances.[49]

The hearing should be an informal, nonadversary proceeding in which the rules of evidence are not applicable.[50] This is consistent with the basic policy consideration underlying the requirement of the hearing; *i.e.*, to provide the governing authorities with as much information

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[45]MISS. CODE ANN. § 21-13-11 (1972), requires that "*[e]very ordinance* passed by the governing body of a municipality . . . shall be . . . published at least one time in some newspaper published in such municipality, or, if there be no such newspaper, then by posting a copy of same at three or more public places within the corporate limits of such municipality for one week . . . before such ordinance shall be effective." (emphasis added).

[46]It is possible that if material changes are made in the ordinance as a result of the hearing, then those persons who relied on the proposed ordinance as published and did not attend the meeting, could contest the validity of the ordinance, alleging lack of fair notice. It is submitted that these persons should be notified of such revisions.

[47]MISS. CODE ANN. § 21-19-25 (1972).

[48]*Id.* § 17-1-15.

[49]R. ANDERSON, *supra* note 31, § 4.11, at 168.

[50]R. ANDERSON, 3 AMERICAN LAW OF ZONING § 16.24, at 211-12 (1968); D. HAGMAN, *supra* note 2, at § 122; A. RATHKOPF, 2 THE LAW OF ZONING AND PLANNING 44-1 to -2 (3d. ed. 1964); E. YOKLEY, 2 ZONING LAW AND PRACTICE § 13-9, at 93-94 (3d. ed. 1965).

as possible concerning regulations which vitally affect the community at large as well as individual landowners. Our court has not yet specifically enunciated its adherence to the foregoing general rule, but has held that possibly incompetent testimony at an informal hearing does not violate an objector's constitutional right to due process of law[51] and has stated that it is proper to place a time limitation on oral argument.[52] However, in *McKibben v. City of Jackson*[53] the right of cross-examination was denied because appellant had failed to assert that right at the hearing. In view of the setting (the city hall rather than a court room), the forum (laymen rather than judges), the parties (any interested citizen rather than adversaries), and the purpose, it is submitted that the hearing should be informal and that the rules of evidence should not be applied. The court should so rule when a proper case is presented. This is especially true considering the minimal statutory effect that the hearing has upon adoption or amendment of the ordinance.[54] Practically speaking, it would be extremely difficult to conduct a formal hearing in the emotionally-charged situation which so frequently is found at a zoning hearing.

D. Adopting the Ordinance

Although the statute permits "the governing authority of each municipality and county [to] provide for the manner in which zoning regulations . . . shall be determined, established and enforced . . . ,"[55] the general practice is to impose zoning regulations by ordinance. Since the zoning enabling legislation does not establish the procedure for enacting the ordinance, except that 15 days' notice of the hearing is required, it must be concluded that the general municipal ordinance statutes[56] are applicable. These general ordinance statutes provide that the proposed ordinance be reduced to writing prior to the public hearing and read section by section at a regular or special meeting of the board.[57]

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[51]Fowler v. City of Hattiesburg, 196 So. 2d 358 (Miss. 1967).

[52]City of Jackson v. Cunningham, 253 So. 2d 385 (Miss. 1971).

[53]193 So. 2d 741 (Miss. 1967).

[54]The local governing authority is only affected by the hearing requirement when an amendment is proposed. A two-thirds vote by the authority is necessary to enact an amendment when 20 percent or more of the landowners who live within 160 feet of the affected property protest. MISS. CODE ANN. § 17-1-17 (1972). The court has held this to be a mandatory requirment which cannot be reduced or enlarged; *i.e.*, the local governing authority cannot pass an ordinance permitting less than or more than a two-thirds vote. City of Jackson v. Freeman-Howie, Inc., 239 Miss. 84, 121 So. 2d 120 (1960).

[55]MISS. CODE ANN. § 17-1-15 (1972).

[56]*Id.* §§ 21-13-1 to -21. *See* Blacklidge v. City of Gulfport, 223 So. 2d 530, 534 (Miss. 1969).

[57]MISS. CODE ANN. § 21-13-5 (1972). Special meetings are provided for in MISS. CODE ANN. §§ 21-3-21, -5-13, -9-39 (1972).

After "parties in interest and citizens" have had a reasonable opportunity to be heard, the members of the board vote by "yeas" and "nays" with the votes recorded in the minutes.[58] When the governmental body considering the zoning ordinance is a municipality operating under the council-manager form of government, a majority vote of the entire council is required to adopt the ordinance.[59] Where a county is involved, or a municipality with a different form of government, a majority of a quorum is sufficient.[60] Upon passage by the requisite vote, the ordinance must be, (1) signed by the mayor or a majority of the board and attested by the clerk, (2) recorded in the ordinance book, (3) published at least once in a newspaper of local circulation or posted in three public places,[61] and (4) properly entered in the minutes which must be signed and attested.[62] Although municipal ordinances generally do not become effective until 30 days after passage and publication, the municipal authorities may make the ordinance effective immediately if an emergency situation is found to exist.[63] However, in such cases, a unanimous vote of the governing authority is required.[64]

Counties present special problems. Although the legislature integrated county and municipal zoning enabling legislation, the fact that counties usually act by order or resolution may make the municipal ordinance requirements inapplicable.[65]

Ambiguities concerning the required content of the notice of public hearing coupled with uncertainty concerning the applicability of the general ordinance publication provisions create a dilemma for the practitioner. Should the ordinance be published in full before and after enactment? It is submitted that the careful practitioner, exercising an abundance of precaution, should publish before and after adoption.[66] Obviously, since repeated publication of lengthy ordinances will be

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[58]*Id.* § 21-13-5.

[59]*Id.* § 21-9-39. For a discussion of this and other vote requirements see Ezell v. City of Pascagoula, 240 So. 2d 700 (Miss. 1970).

[60]Ezell v. City of Pascagoula, 240 So. 2d 700 (Miss. 1970); Marlar v. Board of Supervisors, 185 Miss. 120, 187 So. 879 (1939).

[61]MISS. CODE ANN. § 21-13-11 (1972).

[62]*Id.* § 21-15-17. Failure to comply with these requirements will invalidate the ordinance. Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958).

[63]MISS. CODE ANN. § 21-13-11 (1972).

[64]*Id.*

[65]*E.g.*, Moore v. Board of Supervisors, 227 So. 2d 862 (Miss. 1969); Herbert v. Board of Supervisors, 241 Miss. 223, 130 So. 2d 250 (1961).

[66]Pascagoula recently enacted a comprehensive zoning ordinance. Roy C. Williams, Attorney for the Planning Commission of the City of Pascagoula, concluded that it was necessary to publish before and after the hearing. Telephone interview with Roy C. Williams, Attorney for the Planning Commission of the City of Pascagoula, Dec. 5, 1973.

quite expensive,[67] it is urged that the legislature take immediate action to solve this problem.

E. The Map

Although the planning commission is authorized to prepare and propose a zoning ordinance map, the governing authority surprisingly is not required to have such a map prepared;[68] however, if the ordinance fails to delineate the zones within its text, a map is required to establish the zoning district boundaries with reasonable certainty.[69] The map is customarily incorporated into the zoning ordinance by reference, our court having held this practice to be valid.[70] As previously mentioned, it is not necessary that the map be published with the notice of hearing.[71] Our court, nevertheless, does follow the general rule that the ordinance may be invalid if the map referred to in the ordinance has been lost, misplaced, never prepared, or is unavailable for public inspection.[72] However, actual knowledge of the zoning classification applicable to the objector's property will abrogate this defect.[73]

III. Implementing the Ordinance

Assuming that the statutory requirements for enacting the ordinance have been satisfied and that the ordinance has been legally adopted, the local government must provide for its administration. The statutes furnish little guidance beyond provisions for services of the engineer and advisory boards.[74] It is apparent, however, from the cases[75] and the general practice in Mississippi that the following administrative structure is acceptable and workable subject to the limitations mentioned below:

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[67]Total cost of publication of the zoning ordinance for Pascagoula exceeded $2,400. *Id.*

[68]Miss. Code Ann. §§ 17-1-1, -37 (1972).

[69]Ballard v. Smith, 234 Miss. 531, 539, 107 So. 2d 580, 583 (1958). *See also* R. Anderson, *supra*, note 31, at § 8.07.

[70]Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958).

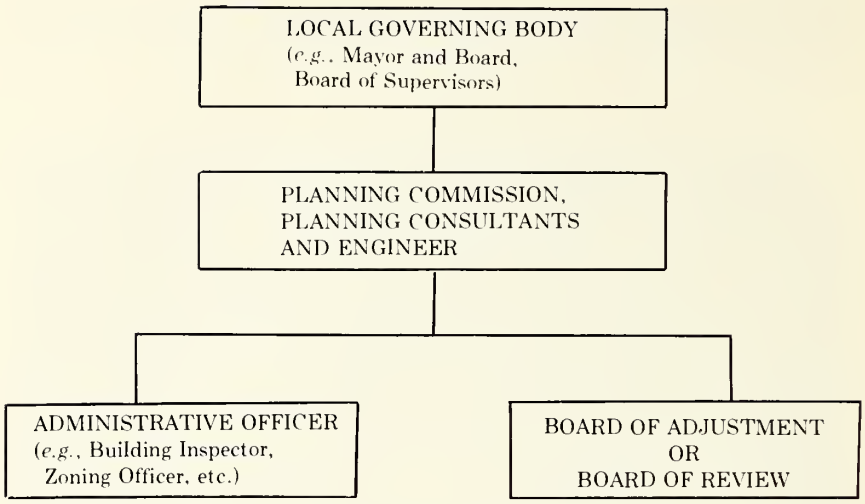
[71]Arkansas Fuel Oil Co. v. City of Oxford, 188 Miss. 455, 195 So. 316 (1940).

[72]Ballard v. Smith, 234 Miss. 531, 541, 107 So. 2d 580, 584 (1958).

[73]*Id.*

[74]Miss. Code Ann. §§ 17-1-11, -13, -17 (1972).

[75]*E.g.*, City of Jackson v. Sheppard Inv. Co., 185 So. 2d 675 (Miss. 1966); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966); Sanderson v. City of Hattiesburg, 249 Miss. 656, 163 So. 2d 739 (1964); City of Hattiesburg v. L. & A. Contracting Co., 248 Miss. 346, 159 So. 2d 74 (1963).



A. The Planning Commission

After adoption and enactment of the zoning ordinance, the continuing responsibility of the planning commission is to make additional studies and recommendations to the local governing body. Much of the post-adoption work of the planning commission is related to requests for use classification changes in the form of proposed amendments to the ordinance.[76] Our court has repeatedly held that the recommendations of the planning commission are not binding and may be accepted or rejected by the governing authority.[77] Persons appearing before the planning commission are entitled to a reasonable opportunity to be heard by that body and again by the governing authority *de novo*;[78] however, the burden of requesting these hearings is upon the aggrieved party and reasonable limitations may be imposed by the governing authority.[79] The city of Jackson limits the hearing before the governing authority to the record of the planning commission hearing.[80] Although not mentioned in the statutes, one must conclude that the legislature intended that minutes of the meetings of the planning commission, the board of adjustment, or other administrative zoning boards, be kept since reference is made to the record of the hearing.[81] Hearings before the planning

[76]*E.g.*, City of Jackson v. Sheppard Inv. Co., 185 So. 2d 675 (Miss. 1966); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966); Sanderson v. City of Hattiesburg, 249 Miss. 656, 163 So. 2d 739 (1964).

[77]Cases cited note 76 *supra*.

[78]MISS. CODE ANN. § 17-1-17 (1972).

[79]*See, e.g.*, City of Jackson v. Cunningham, 253 So. 2d 385 (Miss. 1971).

[80]MISS. CODE ANN. § 17-1-17 (1972).

[81]*Id.*

commission and other administrative boards should be as informal as hearings before the governing authority.

B. *The Board of Adjustment or Review*

While our zoning enabling legislation does not provide for a board of adjustment or review, the Standard State Zoning Enabling Act,[82] from which our law is derived, contemplates such a board. It is the practice in Mississippi[83] to include a board of adjustment or review in the administrative structure, and to vest this board with authority to reverse or modify the action of the zoning officer and to grant or reject applications for exceptions and variances.[84] Since amendments to the zoning ordinance are legislative acts, the board of adjustment has no authority to act on requests for amendments; but the governing authority may request recommendations from the board or the planning commission concerning proposed amendments.[85]

C. *The Administrative Officer*

If the ordinance is to be efficiently administered and properly enforced, a ministerial officer must be appointed. He may be called the zoning officer or building inspector, and in smaller municipalities or counties, his duties may be performed by the municipal or chancery clerk. His primary duties include issuing or refusing to issue building and use permits; inspecting construction on and use of property; issuing stop orders; and furnishing information requested by the board of adjustment, planning commission, or governing authority. Clearly defined guidelines for issuance or nonissuance of requested permits must be provided by the terms of the ordinance since it is improper to delegate discretionary powers to the ministerial officer.[86]

IV. Vested Rights

Mistakes will be made by the ministerial officer administering the

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[82]Standard State Zoning Enabling Act § 7, *reprinted in* R. Anderson, 4 American Law of Zoning § 26.01 (1968).

[83]*E.g.*, Batesville, Miss., Zoning Ordinance, art. XVII, March 1969; Moss Point, Miss., Zoning Ordinance, art. VII, Aug. 1966; Ocean Springs, Miss., Zoning Ordinance, art. VIII, July 1972; Pascagoula, Miss., Zoning Ordinance, art. VII, 1973 (proposed); Vicksburg, Miss., Zoning Ordinance, art. V, Nov. 1970.

[84]Exceptions and variances are discussed at text accompanying notes 126 through 142 *infra*.

[85]It is not uncommon for persons to serve on both the planning commission and the board of adjustment.

[86]King v. City of Clarksdale, 186 So. 2d 228 (Miss. 1966); City of Jackson v. Craft, 36 So. 2d 149 (Miss. 1948).

zoning regulations. Problems arise when a landowner relies upon formal (issuance of a permit) or informal (oral assurances) authorization by the administrative officer or board and later learns that such authorization was improperly given. In such cases, the courts have generally held that the holder of the permit or authorization obtains no vested rights thereunder and that the governing authority is not estopped from revoking such authorization.[87] This rule is consistent with the universally recognized doctrine that the powers of a ministerial officer are limited to those delegated to him by the governing authority.[88] Such powers do not include authority to permit use of property in a manner prohibited by the ordinance. Also, the governing authority may not properly authorize uses which conflict with the ordinance or which exceed its grant of power from the legislature.[89]

The governing authority may be estopped from revoking the permit if the holder of the permit can show detrimental reliance or if the ordinance is ambiguous. Our court has recently held, however, that no vested rights accrue to the holder of an improperly issued permit even though the holder has relied on the permit to his detriment. Two recent cases graphically illustrate the severity of such a ruling. In *Delta Construction Co. v. City of Pascagoula*,[90] the court rejected the argument that borrowing over $2 million in reliance on an improperly issued permit estopped the city from rescinding the permit. In *City of Jackson v. Kirkland*[91] the court did not agree with the holder's argument that the city was precluded from revoking an improperly issued permit where the holder of the permit had, in reliance thereon, moved a house from one lot to another and incurred substantial expense in so doing. Recognizing the harshness of the result with respect to the holder the court reasoned that when compared to the rights of the protesters living in the neighborhood, the holder's trouble and expense were inconsequential. The court further warned that persons dealing with local governments are charged with knowledge of the powers and limitations of local governments and their officers.[92] On the other hand, if the permit or authorization is properly and legally issued, the governing authority may not rescind or revoke the permit.[93]

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[87]City of Cleveland v. Young, 236 Miss. 632, 111 So. 2d 29 (1959). *See generally* A. RATHKOPF, *supra* note 50, at § 56-1.

[88]*See generally* C. RHYNE, *supra* note 2, at § 4-10.

[89]Mayor of Ponotoc v. White, 230 Miss. 698, 93 So. 2d 852 (1957).

[90]278 So. 2d 436 (Miss. 1973).

[91]276 So. 2d 654 (Miss. 1973).

[92]*Id.* at 656.

[93]*See generally* E. YOKLEY, 1 ZONING LAW AND PRACTICE § 9-5 (3d ed. 1965).

V. Amendments, Variances and Special Exceptions

Many of the problems relating to zoning arise from enactment and implementation of the ordinance. Most of the litigation, however, focuses upon enforcement. When a landowner learns that he not only must obtain the approval of the local government before he may improve his property but that such improvements or contemplated uses may be prohibited by the ordinance, his natural reaction is anger followed by an attempt to circumvent the restriction. He has three possible remedies: (1) amendment, (2) variance, or (3) special exception.[94] In the absence of statutory guidance for the appropriate use of variances and special exceptions, there is little uniformity as to their meaning, and their traditional definitions are not universally accepted. In view of this lack of uniformity, it is urged that reference should always be made to the definitions section of the particular ordinance with which a person is dealing.

A. Amendments

1. Legal Prerequisites

Anticipating that competing interests of landowners (preserving the status quo as opposed to maximum utilization of property) would result in frequent attempts to change use classifications prescribed by the ordinance, the legislature provided the procedure for amendment.[95] Lack of specificity in the amendment statutes intensified by the post World War II land development boom has made it necessary for the courts to prescribe the legal prerequisites for a valid amendment. Although amendments to the ordinance may be made for reasons other than changing use classifications, the great majority of amendments are based on requests to rezone; *i.e.*, to allow a use not presently permitted under the ordinance.[96] Most of the Mississippi zoning cases arise out of such situations.[97]

Amendment of an ordinance is a legislative function which may be performed only by the local governing authority.[98] Our court was quick to adopt the Maryland Rule[99] which provides that amendments to the

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[94]*See generally* D. Hagman, *supra* note 2, at §§ 103-15.

[95]Miss. Code Ann. §§ 17-1-15, -17 (1972).

[96]For example, requests for creation of new use classifications, changing administrative structure or permit procedure, requests for increasing special exceptions for permits, etc.

[97]Of the 74 Mississippi Supreme Court cases found, 47 deal with requests for amendments.

[98]Fowler v. City of Hattiesburg, 196 So. 2d 358, 362 (Miss. 1967).

[99]The Maryland Rule is discussed extensively in Note, 13 Md. L. Rev. 242 (1953).

ordinance may properly be made only where the party seeking the change shows: (1) a mistake in the original zoning or (2) material change in circumstances since enactment of the ordinance.[100] The court, however, has occasionally announced additional criteria which may support an amendment or which may be considered when amendments are contemplated. Fraud,[101] public need for the change,[102] highest and best use of the land,[103] and aesthetic considerations[104] have all been mentioned by the court in rezoning cases. It is fundamental that amendments to the ordinance must be consistent with the comprehensive plan which, as previously mentioned, should be under constant study and reevaluation by the planning commission.[105]

The notice and hearing requirements for adoption of the original ordinance discussed above are applicable to proposed amendments.[106] The statutes prescribing the amendment procedure require that 15 days' notice of the hearing be published in the official paper or a paper of general circulation in the county or municipality.[107] As previously mentioned, *Brooks v. City of Jackson*[108] sets forth the minimum standards for the notice of hearing. Additionally, it is important that the notice adequately describe the property being considered for rezoning since objections by the owners of 20 percent of the property situated within 160 feet of the affected property requires an affirmative vote by two-thirds of the governing body for passage.[109]

While amendment of the ordinance is a nondelegable legislative function of the local governing body, the statute authorizes the county or municipality to empower the engineer or advisory board (planning

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[100]Martinson v. City of Jackson, 215 So. 2d 414 (Miss. 1968); Paine v. Underwood, 203 So. 2d 593 (Miss. 1967); Westminster Presbyterian Church v. City of Jackson, 253 Miss. 495, 176 So. 2d 267 (1965); W.L. Holcomb, Inc. v. City of Clarksdale, 217 Miss. 892, 65 So. 2d 281 (1953). *But see* City of Jackson v. Gaddy, 241 So. 2d 364, 365 (Miss. 1970), where the Court held that even though there had been a material change the landowners were not, as a matter of law, entitled to have the property rezoned.

[101]Westminster Presbyterian Church v. City of Jackson, 253 Miss. 495, 176 So. 2d 267 (1965).

[102]Harris v. City of Jackson, 268 So. 2d 342 (Miss. 1972); City of Jackson v. Bridges, 243 Miss. 646, 139 So. 2d 660 (1962); City of Hattiesburg v. Pittman, 233 Miss. 544, 102 So. 2d 352 (1958).

[103]City of Jackson v. Freeman-Howie, Inc., 239 Miss. 84, 121 So. 2d 120 (1960). *But see* Hinds County Bd. of Supervisors v. Covington, 285 So. 2d 143 (Miss. 1973) (discussion of "highest and best use").

[104]City of Jackson v. Bridges, 243 Miss. 646, 139 So. 2d 660 (1962).

[105]R. ANDERSON, *supra* note 31, at § 5.02.

[106]MISS. CODE ANN §§ 17-1-15, -17 (1972).

[107]*Id.* § 17-1-17.

[108]211 Miss. 246, 51 So. 2d 274 (1951).

[109]MISS. CODE ANN. § 17-1-17 (1972).

commission or board of adjustment) to conduct amendment hearings.[110] The governing authority may accept or reject the recommendation of the advisory board[111] without additional hearings unless a hearing is requested by an aggrieved party.[112]

The hearing requirement gives citizens and parties in interest a reasonable opportunity to voice their opinions concerning the proposed amendment.[113] Ambiguity in the statutory language has resulted in confusion with respect to standing;[114] however, our court clarified this conflict in *Rosenbaum v. City of Meridian*[115] by holding that "[t]his section puts the landowners within the 160' area in a preferred class, but it does not prohibit those landowners who reside outside the 160' area, but live in the area from protesting."[116] It is assumed that by the words "live in the area" the court means within the territorial boundaries of the local government.

Post-amendment publication requirements for zoning ordinances are unclear. If the general ordinance amendment requirement is applicable to changes made in the zoning ordinance, sections 21-13-9 and 21-13-11[117] necessitate publication of the entire ordinance or the section or sections as amended. In view of the volume and frequency of amendments, the legislature should clarify this issue, limiting re-publication to the affected portion of the ordinance, if re-publication is required at all.

Since the map is an integral part of the ordinance, and is usually incorporated by reference therein, amendments to the ordinance should be noted on the map. Indeed, failure to update the map could easily invalidate the amendment for lack of definiteness of description and location.[118]

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[110]*Id.*

[111]Sanderson v. City of Hattiesburg, 240 Miss. 656, 163 So. 2d 739 (1963).

[112]Miss. Code Ann. § 17-1-17 (1972). There is an exception which applies only to the City of Jackson in that hearings before the city commission may be restricted to the record made at the advisory board hearing.

[113]*Id.* §§ 17-1-15, -17.

[114]The only legislative guidance as to standing is found in Miss. Code Ann. § 17-1-17 (1972), concerning amendment cases:

> In case of a protest against such changes signed by the owners of twenty per cent (20%) or more, either of the area of the lots included in such proposed change, or of those immediately adjacent to the rear thereof, extending 160 feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of two-thirds of all the members of the legislative body of such municipality or county.

The Court initially interpreted this section as denying standing to those outside the 160 foot perimeter. Board of Supervisors v. Abide Brothers, Inc., 231 So. 2d 483 (Miss. 1970).

[115]246 So. 2d 539 (Miss. 1971).

[116]*Id.* at 541.

[117]Miss. Code Ann. §§ 21-13-9, -11 (1972).

[118]Ballard v. Smith, 234 Miss. 531, 541, 207 So. 2d 580, 584 (1958); Arkansas Fuel Oil

2. Judicial Review

More than half the zoning cases decided by our court to date have involved questions related to amendment *vel non* of the ordinance with respect to use classification of a particular parcel of land.[119] In *Currie v. Ryan*[120] the court succinctly prescribed the rules concerning judicial review of decisions made by the local governing body in rezoning cases when it stated:

> The order of the city governing board is a legislative function and is presumed to be valid . . . . Whatever may be the personal opinion of the judges of an appeal court on zoning, the court cannot substitute its own judgment as to the wisdom or soundness of the municipality's action. . . . The scope of a reviewing court is limited. The order of the governing body of a municipality may not be set aside by a reviewing court unless it is clearly shown to be arbitrary, capricious, discriminatory or is illegal or without substantial evidential basis.[121]

As an appellate court in rezoning cases, the circuit court's responsibility is two-fold. First, the party seeking the change in use classification must show by clear and convincing evidence (more than a preponderance) that there was a mistake in the original zoning or that there has been a material change in the character of the neighborhood.[122] Second, the reviewing court must determine whether or not "the Board's action . . . was unreasonable, arbitrary, discriminatory or confiscatory or imposed unnecessary or unreasonable hardship . . ."[123] with respect to the aggrieved party.

The reviewing court has the responsibility of assuring that the actions of the governing authority are based on substantial evidence.[124] This involves a judicial determination that the decision of the governing authority was based on something more than a scintilla, but not necessarily a preponderance, of the evidence.

The court has repeatedly stated that actions taken by the local

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Co. v. City of Oxford, 188 Miss. 455, 195 So. 316 (1940). *See also* R. ANDERSON, *supra* note 31, at § 8.07.

[119]Of the 74 Mississippi Supreme Court zoning cases found, 47 are amendment cases.

[120]243 So. 2d 48 (Miss. 1971).

[121]*Id.* at 51 (citations omitted). *See also* Carnes v. Harrow Dev. Co., 244 So. 2d 27 (Miss. 1971).

[122]Hinds County Bd. of Supervisors v. Covington, 285 So. 2d 143 (Miss. 1973); Paine v. Underwood, 203 So. 2d 593 (Miss. 1967); Westminster Presbyterian Church v. City of Jackson, 253 Miss. 495, 176 So. 2d 267 (1965); H.L. Holcomb, Inc. v. City of Clarksdale, 217 Miss. 892, 65 So. 2d 282 (1953).

[123]Hinds County Bd. of Supervisors v. Covington, 285 So. 2d 143 (Miss. 1973). *See also* City of Hattiesburg v. Mercer, 237 Miss. 423, 115 So. 2d 165 (1959).

[124]Currie v. Ryan, 243 So. 2d 48, 52 (Miss. 1971).

governing body are presumed to be valid, that parties aggrieved by such actions bear the burden of proving the invalidity thereof, and that reviewing courts should not constitute themselves as zoning boards but rather should recognize and abide by the rules prescribed above.[125]

B. Variances

Section 7 of the Standard State Zoning Enabling Act provided for a board of adjustment empowered to grant variances.[126] The Mississippi enabling legislation omits that section, but it is the practice in this state for the local governing authority to include such a provision in the ordinance.[127] Some courts have held,[128] and the textwriters conclude,[129] that failure to provide for the granting of relief from the literal application of the terms of the ordinance renders an otherwise valid ordinance infirm as arbitrary if no opportunity is given for review.

Variances were conceived initially as a means for granting relief from height, bulk, and location restrictions in the ordinance which rendered use of the property impossible or impractical.[130] No conceptual problems arise when the variance is granted to authorize minor departures from the terms of the ordinance; *e.g.*, to permit a landowner to place the structure on his lot nearer the lot line than is permitted by the set-back or side-yard requirements. Such relief does not authorize a use inconsistent with the ordinance and, consequently, does not constitute rezoning under the guise of a variance. Authorizing an administrative board to grant bulk variances does not violate the prohibition of unlawful delegation of discretionary powers which are within the exclusive province of the legislative body. Bulk variances afford relief to the landowner who proves unnecessary and unique hardship, but does not request relief which offends the spirit of the ordinance.

On the other hand, serious questions arise when a variance is granted to permit a use otherwise prohibited by the ordinance; *e.g.*, a service station or quick-stop grocery in a residential district. The most obvious danger is that the variance will be utilized to by-pass procedural safeguards required for valid amendment.[131] Additionally, since the use

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[125]Largent v. Bridges, 247 So. 2d 703 (Miss. 1971); Fowler v. City of Hattiesburg, 196 So. 2d 358, 362 (Miss. 1967).

[126]STANDARD STATE ZONING ENABLING ACT, *supra* note 82, at § 7.

[127]Authorities cited note 83 *supra*.

[128]Thomas v. Board of Standards and Appeals, 263 App. Div. 352, 33 N.Y.S.2d 219, 230 (1942); Van Auken v. Kimmey, 141 Misc. 117, 252 N.Y.S. 343, 346-47 (1931).

[129]D. HAGMAN, *supra* note 2, at § 106; C. RHYNE, *supra* note 2, at § 32-18.

[130]*See generally* D. HAGMAN, *supra* note 2, at § 100.

[131]For example, the following are not required in the variance procedure: notice of hearing, hearing, two-thirds vote rule, and court imposed requirements for valid amendment.

variance is granted by an administrative board and authorizes a use otherwise prohibited by the ordinance, there is a usurpation of the legislative determination of the governing authority (original zoning) by the administrative board. This clearly violates the prohibition of unlawful delegation of legislative discretion unless restricted by adequate guidelines.

Such standards as "unnecessary hardship" and "practical difficulties" found in the Standard Enabling Act, although general, have been approved as sufficiently limiting the discretionary powers of the administrative board.[132] In some jurisdictions the courts have considered such standards to be inadequate but have held that the requirement of a hearing on the request for variance cures the defect.[133] Although frequently criticized by planners[134] and peculiarly susceptible to misuse by lay members of the administrative board, it is clear that use variances are widely recognized.[135]

Since the enabling act in this state does not provide for variances, it is incumbent upon the local governing body to include the remedy in its ordinance.[136] In determining when a variance should be granted, the administrative board should consider: (1) the effect on the public, (2) the effect on nearby landowners, and (3) the characteristics of the subject property.[137] Our court provided unequivocal guidance in *Westminster Presbyterian Church v. City of Jackson*,[138] when, considering the city's refusal to grant a variance to permit petitioner to construct a service station on a lot in a residential district, it adopted the general rule and said:

> A variance to construct or operate a service station or garage *should not be granted* merely because such use of the property will be more *convenient or profitable* to the owner, or because he will suffer some *financial disadvantage or hardship* if denied such use; it is essential that applicant should suffer some unusual hardship from the literal enforcement of the regulation *different from*, and *greater than*, that suffered by *other property owners* in the district. The variance or exception should not be granted unless the proposed use of the property is within the spirit of the zoning regulations.[139]

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[132]R. ANDERSON, 2 AMERICAN LAW OF ZONING § 14.08 (1968) and cases cited therein.

[133]*Id.*

[134]Interview with Mr. Clyde Cook, Chairman of the Dept. of Urban and Regional Planning, University of Mississippi, in Oxford, Miss., Dec. 10, 1973.

[135]D. HAGMAN, *supra*, note 2, at § 106.

[136]The Airport Zoning Law of Mississippi does permit the granting of variances. MISS. CODE ANN. §§ 61-7-21, -23 (1972).

[137]D. HAGMAN, *supra* note 2, at § 106. *See also* Mayor of Pontotoc v. White, 230 Miss. 698, 707, 93 So. 2d 852, 856 (1957).

[138]253 Miss. 495, 176 So. 2d 267 (1965).

[139]62 C.J.S. *Municipal Corporations* § 227(15)c (1949), *cited in* Westminster Presby-

C. *Special Exceptions*

Although there is a tendency to use the terms variance and special exception interchangeably, the terms are not synonymous. Unlike the variance, which is available only upon proof of unusual hardship, the special exception requires no such proof:

> A special permit [exception] authorizes a use which is permitted by the zoning regulations, subject to the issuance of such a permit. Thus . . . "[a] special exception within the meaning of the zoning ordinance is one which is controlled and which is expressly permissible in a given zone . . . ."[140]

As in the case of variances, the board of adjustment or other designated administrative board is vested with the power to hear and decide requests for special exceptions.[141] Since the ordinance provides for uses which may be permitted by special exceptions; *e.g.*, location of a church in a single-family residential district, the administrative board is afforded adequate guidance in such cases. It should be noted that besides requiring special permits for designated uses, the governing authority, acting through the administrative board, may require certain findings of fact prior to issuance of the permit.[142] For example, if a church is to build in a residential zone the board may be required to determine that adequate off-street parking is available prior to granting the special exception or permit.

VI. Spot Zoning, Conditional Zoning and Non-Conforming Uses

A. *Spot Zoning*[143]

The Mississippi Supreme Court, in its most recent pronouncement concerning "spot zoning," stated:

> The . . . question is whether the order involved constitutes spot zoning and was therefore discriminatory and illegal. . . . [T]he term "spot zoning" is ordinarily used where a zoning ordinance is amended reclassifying one or more tracts or lots for uses prohibited by the original zoning ordinance, and out of harmony therewith, and whether such an amendment will be held void depends upon the circumstances of each case. We cannot say as a matter of law that the rezoning of this prop-

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terian Church v. City of Jackson, 253 Miss. 495, 506, 176 So. 2d 267, 272 (1965) (emphasis added).

[140]R. Anderson, *supra* note 50, at § 15.02.

[141]Standard State Zoning Enabling Act, *supra* note 82, at § 7.

[142]*See generally* C. Rhyne, *supra* note 2, at § 32-23.

[143]For an extensive discussion of "spot zoning" in Mississippi see 41 Miss. L.J. 154 (1969).

> erty to Residential A-2 so as to be used for modern townhouse dwellings is illegal as "spot zoning." It was a matter for the City Council to take into consideration, but not one for this Court . . . . The Court has repeatedly stated that zoning is essentially a legislative function and the scope of judicial review is limited. It is not what the judges of this Court individually believe would be proper zoning of property but whether we are justified in reversing the order of the duly constituted authorities whose function is to decide such questions.[114]

Although the court has not expressly held "spot zoning" to be illegal, it is safe to conclude from the language quoted above that in a proper case the court would so hold. To warrant judicial reversal of a legislative determination, however, the party alleging "spot zoning" must prove by clear and convincing evidence that the action of the local government was unreasonable, arbitrary, capricious, discriminatory, or without substantial evidential basis.[115]

B. Conditional Zoning

Our court has not specifically held that conditional zoning is improper but has indicated its recognition of the general rule which prohibits the imposition of conditions as a prerequisite to rezoning.[116] It would seem that the imposition of conditions imperils the validity of a zoning amendment since such (1) may involve improper delimiting of legislative authority,[117] (2) may permit rezoning without adherence to procedural (*e.g.*, hearing)[118] and substantive[119] (*e.g.*, mistake or change) requirements, or (3) may be discriminatory in that an amendment singles out a parcel of land and thereby violates the uniformity requirement found in the enabling legislation.[120]

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[114]City of Jackson v. Ridgway, 261 So. 2d 458, 459-60 (Miss. 1972).

[115]Hinds County Bd. of Supervisors v. Covington, 285 So.2d 143 (Miss. 1973); Currie v. Ryan, 243 So. 2d 48 (Miss. 1971); Howie v. Autrey, 209 So. 2d 904 (Miss. 1968).

[116]Lewis v. City of Jackson, 184 So. 2d 384, 388 (Miss. 1966). There is disagreement on this question. At least five jurisdictions have held conditional zoning to be valid (Mass., Neb., Ohio, N.Y., and Md.). R. ANDERSON, *supra* note 31, § 8.21 at 616. *See generally* Beth Israel Congregation v. City of Jackson, 210 So. 2d 676 (Miss. 1968), wherein the court held that rezoning property from residential to commercial was proper and that in the absence of good cause the city could not refuse to issue a permit for construction of a service station which was a permitted use under the ordinance as amended.

[117]*See generally* R. ANDERSON, *supra* note 31, at §§ 8.20-.21; Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267 (1968).

[118]SHAPIRO, *supra* note 147, at 269.

[119]*See* Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966).

[120]"All . . . regulations shall be uniform. . . ." STANDARD STATE ZONING ENABLING ACT, *supra* note 82, at § 7.

C. *Non-Conforming Uses*

Neither the Standard State Zoning Enabling Act nor the zoning enabling legislation adopted by Mississippi provides for non-conforming uses. Most zoning ordinances, however, permit lawful uses in existence at the time of enactment of the ordinance to continue, even though such uses may be prohibited by the ordinance in that particular district.[151] Expansion of nonconforming uses is generally restricted, and such restrictions have been upheld by our court.[152] Non-conforming uses include both non-conforming structures and activities. In the event of destruction or damage to the structure or termination or abandonment of the activity, the ordinance may provide that such non-conforming structure or activity can not be revived.[153] The ordinance may also limit the time in which damaged or destroyed structures are to be repaired or rebuilt.[154] Additionally, a non-conforming activity may be deemed to be abandoned if the activity is terminated for a time period specified in the ordinance.[155]

Our court has not been confronted with the question of validity of amortization of non-conforming uses. Other jurisdictions, however, have held this practice to be valid where the ordinance provides a reasonable amortization schedule.[156]

VII. Appeals, Remedies, Enforcement and Judicial Review

A. *Mandamus*

Most of the zoning cases arise out of situations involving dissatisfaction of a landowner with action taken by the local government. Frequently, however, a party is aggrieved by the refusal or failure of an officer or board of the local governing authority to take action on his

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[151]*E.g.*, Batesville, Miss., Zoning Ordinance, art. XV, March 1969; Moss Point, Miss., Zoning Ordinance, art. III, Aug. 1966; Ocean Springs, Miss., Zoning Ordinance, art. VII, July 1972; Pascagoula, Miss., Zoning Ordinance, art. VI, 1973 (proposed); Vicksburg, Miss., Zoning Ordinance, art. IV, Nov. 1970.

[152]City of Hattieshurg v. L. & A. Contracting Co., 248 Miss. 346, 159 So. 2d 74 (1963); Mayor of Pontotoc v. White, 230 Miss. 698, 93 So. 2d 852 (1957). *But see* Jones v. City of Hattieshurg, 207 Miss. 491, 42 So. 2d 717 (1949).

[153]Ezell v. City of Pascagoula, 240 So. 2d 700 (Miss. 1970); Mayor of Pontotoc v. White, 230 Miss. 698, 93 So. 2d 852 (1957); Walker v. City of Biloxi, 229 Miss. 890, 92 So. 2d 227 (1957); Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951).

[154]Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951). Here the court held that the ordinance could define that which constitutes destruction of the non-conforming structure.

[155]C. Rhyne, *supra* note 2, at § 32-31.

[156]Standard Oil Co. v. Tallahassee, 183 F.2d 410, 413 (5th Cir. 1950); Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34, 40-45 (1954); State v. Jacoby, 168 La. 752, 123 So. 314 (1929).

request. In such cases it may be necessary for the aggrieved party to seek a writ of mandamus.[157] Although such a remedy is extraordinary, our court has held it to be available in zoning cases when petitioner shows that: (1) he is entitled to the relief sought, (2) defendant has a legal duty to do what petitioner is requesting, and (3) petitioner has no adequate remedy at law.[158] Mandamus is available to compel signing of a bill of exceptions[159] as well as issuance of a building permit.[160]

B. Appeals — Bill of Exceptions and Writ of Certiorari

Where the landowner is dissatisfied with the action taken by the administrative officer, he is entitled to a hearing before the appropriate administrative board.[161] If he fails to receive a favorable ruling from that board, he is entitled to a hearing before the local governing body.[162] If aggrieved by the action taken by the local governing body, he has exhausted his administrative remedies and may seek relief in the courts.

The Mississippi Supreme Court has recognized two methods of appeal from decisions of the local governing body in zoning matters: bill of exceptions[163] and writ of certiorari.[164] Since the bill of exceptions is available as a matter of right while certiorari is available only at the discretion of the circuit court, the aggrieved party should take care to preserve his right to appeal by bill of exceptions. The procedural requirements of the statute are jurisdictional; *to wit*, signing of the bill of exceptions by the mayor or person acting as president of the board of supervisors within 10 days of the date of adjournment of the meeting at which the action was taken.[165] The mayor or president of the board of supervisors must sign the bill of exceptions, although he is entitled to point out discrepancies in the bill and to have a corrected copy presented to him for his signature.[166] This is true even though the mayor or board president is the successor in office of the official who presided at the hearing.[167] To avoid disagreement concerning what transpired at the hearing, the party seeking relief from the governing authority should make a tape recording or stenographic record of the proceeding.

The statute does not prescribe the form of the bill of exceptions but

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[157]MISS. CODE ANN. §§ 11-41-1, -21 (1972).
[158]Thompson v. Mayfield, 204 So. 2d 878, 880 (Miss. 1967).
[159]Reed v. Adams, 236 Miss. 333, 111 So. 2d 222 (1959).
[160]Berry v. Enbry, 238 Miss. 819, 120 So. 2d 165 (1960).
[161]STANDARD STATE ZONING ENABLING ACT *supra* note 82, at § 7.
[162]MISS. CODE ANN. § 17-1-17 (1972).
[163]*Id.* § 11-51-75; Reed v. Adams, 236 Miss. 333, 111 So. 2d 222, 224-25 (1959).
[164]Mayor of Pontotoc v. White, 230 Miss. 698, 93 So. 2d 852 (1957).
[165]City of Jackson v. Varia, Inc., 241 Miss. 705, 133 So. 2d 16 (1961).
[166]Reed v. Adams, 236 Miss. 333, 341, 111 So. 2d 222, 225 (1959).
[167]Koestler v. Dallas Tank Co., 234 Miss. 104, 105 So. 2d 621 (1958).

merely describes the document as a writing which embodies the facts and judgment or the decision of the board.[168] Failure to attach the zoning ordinance to the bill does not render the bill invalid.[169]

The inquiry of the circuit court is limited to the record presented in the bill of exceptions.[170] As previously stated, the court has repeatedly urged the lower court not to constitute itself as a zoning board[171] and to refrain from substituting its judgment for that of the governing authority.[172] The decision of the local governing body should not be reversed by the circuit court unless the decision of the governing authority was clearly unreasonable, arbitrary, discriminatory, or capricious.[173]

C. *Injunction*

The extraordinary remedy of injunction may be available to challenge the validity of the ordinance[174] or amendments thereto,[175] or to enforce the zoning regulations.[176] In *Brooks v. City of Jackson*[177] the city had amended its ordinance at the request of a property owner to authorize a commercial use in a previously residential district. Adjoining landowners, who did not object at the hearing but were able to show that the notice was defective, sought an injunction to prohibit the city from amending the zoning map and the landowner from conveying to any commercial interest. The court in recognizing the availability of injunctive relief in zoning cases said:

> It is true, of course, that courts of equity do not interfere to accommodate mere apprehensions of injury, and it is only where the injury is substantial and there is reasonable probability that it will occur that the remedy by injunction is available. It is likewise true, however, that the remedy by injunction is preventive in its nature, and that it is not necessary to wait for the actual occurrence of the injury, since, if this

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[168]Miss. Code Ann. § 11-51-75 (1972).

[169]Weathersby v. City of Jackson, 226 So. 2d 739 (Miss. 1969). *Caveat*: If the case turns on some provision of the zoning ordinance, the ordinance should be attached to the bill of exceptions. The court cannot take judicial notice of the city ordinance. Stewart v. City of Pascagoula, 206 So. 2d 325 (Miss. 1968).

[170]City of Jackson v. Husbands, 233 So. 2d 817, 820 (Miss. 1970).

[171]Jackson v. Schwartz, 244 So. 2d 8, 10 (Miss. 1971).

[172]City of Jackson v. Ridgway, 261 So. 2d 458, 460 (Miss. 1972).

[173]Ridgewood Land Co. v. Moore, 222 So. 2d 378, 379 (Miss. 1969).

[174]Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958).

[175]Brooks v. City of Jackson, 211 Miss. 246, 51 So. 2d 274 (1951).

[176]Highland Village Land Co. v. City of Jackson, 243 Miss. 34, 137 So. 2d 549 (1962); Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958); Brooks v. City of Jackson, 211 Miss. 246, 51 So. 2d 274 (1951).

[177]211 Miss. 246, 51 So. 2d 274 (1951).

were required, the purpose for which the relief is sought would, in most cases, be defeated.[178]

Injunctive relief is also available to the governing authority in its enforcement procedures,[179] although it is not necessary that the governing authority exhaust its own administrative remedies prior to seeking such relief in the courts.[180] The court has recognized this remedy where the governing authority sought to prevent institution[181] or expansion[182] of non-conforming uses.

D. Criminal Prosecution

The legislature has also provided that "any person . . . who shall knowingly and wilfully violate the terms, conditions or provisions of a zoning ordinance . . . shall be guilty of a misdemeanor . . . ."[183] If convicted of violating the ordinance, the misdemeanant may be fined a maximum of $100, and each day the violation continues without a reasonable corrective effort constitutes a separate offense.[184] This criminal penalty is prescribed only where there is no other available criminal penalty. There is an unanswered question as to who may prescribe the "other criminal penalty." If the legislature intended a greater penalty than that imposed by section 17-1-27, it would seem that the municipality, pursuant to section 21-13-1,[185] could provide in its ordinance for a fine not to exceed $300 or imprisonment for up to 90 days or both. However, if the legislature intended to reserve the power to prescribe penalties for violation of the zoning ordinance unto itself, this statute controls until superseded by subsequent legislative action.

E. Res Judicata

The doctrine of res judicata is applicable in zoning disputes in

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[178]*Id.* at 254, 51 So. 2d at 277. *Accord*, Fitzhugh v. City of Jackson, 132 Miss. 585, 97 So. 190 (1923), *cited with approval in* Brooks v. City of Jackson, 211 Miss. 246, 252, 51 So. 2d 274, 276 (1951). In *Fitzhugh* the court stated:

> [W]here a municipal ordinance is void and its provisions are about to be enforced, or are being enforced any person who is injuriously affected thereby either in his person or the use of his property may go into a court of equity to have the enforcement of the ordinance stayed by injunction.

132 Miss. at 603, 97 So. at 191.

[179]MISS. CODE ANN. § 17-1-19 (1972).

[180]City of Hattiesburg v. L. & A. Contracting Co., 248 Miss. 346, 159 So. 2d 74 (1963).

[181]Walker v. City of Biloxi, 229 Miss. 890, 92 So. 2d. 227 (1957).

[182]City of Hattiesburg v. L. & A. Contracting Co., 248 Miss. 346, 159 So. 2d 74 (1963).

[183]MISS. CODE ANN. § 17-1-27 (1972).

[184]*Id.*

[185]*Id.* § 21-13-1.

appropriate cases. The governing authority frequently must hear requests which involve the same parties, issues, and property as involved in prior hearings. In such cases the doctrines of res judicata and collateral estoppel are applicable,[186] and the burden is on the petitioner to show that there has been a material change in circumstances[187] or that the relief sought is different from that requested in previous hearings.[188] The court has held that it is not necessary for a formal plea of res judicata to be filed, and it appears that the council could of its own motion raise the bar.[189] Indeed, in *City of Jackson v. Holliday*[190] the court stated that in the absence of proof of change in circumstances the governing authority *must* apply the doctrine of res judicata.

VIII. Conclusion

The need to modernize our zoning enabling legislation was recognized and expressed in this Journal by Joel Walker in 1960.[191] The legislation has not been forthcoming, and the need has been magnified by urbanization, adoption of land use regulation ordinances,[192] environmental considerations, and land development in rural[193] and urban areas. Our court has performed admirably, supplementing the existing zoning legislation with well-reasoned, consistent decisions.

Mississippi, with its vast areas of undeveloped land and its relative freedom from urban problems currently plaguing many areas of the country, has an unusual and extremely valuable opportunity to avoid many of the perplexing and expensive land use related problems of today.[194] In view of existing and proposed national land use programs,[195] increasing popularity of statewide restrictions,[196] and growth of regional

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[186]City of Jackson v. May, 193 So. 2d 555 (Miss. 1967); Westminster Presbyterian Church v. City of Jackson, 253 Miss. 495, 176 So. 2d 267, 270 (1965).

[187]Patterson v. City of Jackson, 285 So. 2d 466 (Miss. 1973); City of Jackson v. May, 193 So. 2d 555 (Miss. 1967).

[188]City of Jackson v. Ridgway, 261 So. 2d 458 (Miss. 1972); Yates v. City of Jackson, 244 So. 2d 724 (Miss. 1971).

[189]City of Jackson v. Wilson, 195 So. 2d 470 (Miss. 1966); Westminster Presbyterian Church v. City of Jackson, 253 Miss. 495, 176 So. 2d 267 (1965).

[190]246 Miss. 412, 149 So. 2d 525 (1963). *See also* Love v. City of Jackson, 248 So. 2d 633 (Miss. 1971).

[191]Walker, *supra* note 1, at 263.

[192]The authority to enact subdivision regulations is found within our zoning enabling legislation.

[193]For discussion of rural zoning see Moore v. Madison County Bd. of Supervisors, 227 So. 2d 862 (Miss. 1969); Frederic v. Jackson County Bd. of Supervisors, 197 Miss. 293, 20 So. 2d 92 (1944).

[194]Time, Oct. 1, 1973, at 80.

[195]D. Hagman, *supra* note 2, at §§ 6-10.

[196]*Id.* at § 11. For a discussion of statewide zoning concepts see Miller, *Hawaii's*

use regulation concepts,[197] together with widespread acceptance of the planning process and the sophistication of that profession, Mississippi should evaluate its existing legislation and make those changes which will best serve the future needs of the state.

It is hoped that this article accurately and concisely depicts the current status of zoning law in Mississippi and provides some insight into the problems stemming from ambiguous or inadequate legislation. Many states have enacted planning enabling legislation,[198] official map acts,[199] substantially broader and more detailed zoning enabling legislation,[200] and subdivision controls.[201] Prudence demands that we study these and other techniques, utilize those provisions best suited for this state and its growth, and thereby enhance and protect the quality of life presently enjoyed by Mississippians.

"Quiet Revolution" Hits the Mainland, NATIONAL CIVIC REVIEW, Sept. 1973, at 412.

[197]D. HAGMAN, *supra* note 2, at § 12.

[198]Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW AND CONTEMPORARY PROBLEMS 353 (1955).

[199]D. HAGMAN, *supra* note 2, at §§ 146-51.

[200]For example, Mississippi omitted Section 7 of the Standard State Zoning Enabling Act which provides, *inter alia*, for variances, exceptions, and the board of adjustment and appeals. These now must be handled, if at all, at the local level.

[201]D. HAGMAN, *supra* note 2, at §§ 134-45.

MUNICIPAL ANNEXATION IN MISSISSIPPI

L. Arnold Pyle and David W. Mockbee***

Introduction

Annexation, a flexible method of reorganizing local government, finds its major strength in the enlargement of the geographical jurisdiction of municipalities. It keeps the governmental pattern from becoming more complex by limiting incorporation of new municipalities and the creation of limited-purpose special districts, thereby strengthening general-purpose governments. Annexation also brings fringe areas under controlled growth and development. When uncontrolled, such areas are often a source of trouble and cost for the entire area, including the annexing municipality.[1]

Mississippi is facing an ever increasing migration of rural residents to the urban areas of the state.[2] With this influx into our cities and their surrounding environs comes an urgent need for a reanalysis and increased understanding of the Mississippi statutes governing municipal annexation.

The importance of liberal annexation statutes in today's urbanized society cannot be overemphasized. Proper planning is the key to proper metropolitan growth; therefore, municipal authorities must have a certain degree of discretion in annexation proceedings to insure a sufficient planning base to control such growth.[3] Large segments of our population are moving to the urban areas for employment, educational, and cultural purposes. They are moving into areas adjacent to our present municipalities, causing heavily populated fringe areas to spring up around them. Once suburbs are established in these fringe areas, the central city dilemma evolves: the inhabitants avail themselves of the municipality's business establishments, thoroughfares, and recreational facilities; add to congestion and the expense of services; and, in many instances, establish commercial enterprises on the outskirts of the municipality to enjoy the large market created by the concentrated munici-

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[1]S. Sato & A. Van Alstyne, State and Local Government Law 43 (1970).

[2]From 1960 to 1970, the urban population in Mississippi increased by 20.2 percent to a total of 44.5 percent of the state's population. During this same period, 1960-1970, the state's rural population decreased by 9.4 percent. U.S. Dep't of Commerce, Statistical Abstract of the United States 18 (1971).

[3]Note, *Annexation and the Law in South Carolina*, 13 S.C.L.Q. 258, 259 (1961).

pal population; but do not share in the concomitant problems and expenses of city dwelling.[4] Since these persons are allowed to enjoy all of the benefits of city dwelling, they should not be heard to complain when asked, through annexation proceedings, to share in the city's burdens.

Regardless of whether suburbanites choose the fringe areas over the municipality itself because of already overcrowded conditions within municipal boundaries or because of a desire to avoid higher municipal ad valorem taxes, annexation statutes must afford municipal officials adequate authority to include fringe areas within the corporate limits when reasonably needed by the municipality. This need is particularly urgent when a municipality has failed to plan in the past:

> Nearly every American city today is paying a heavy penalty for its shortsightedness in allowing individual interest to outweigh community interest in city planning; and the severity of the penalty is increasing as the city grows and its social and economic structure becomes more complex. Relief can be had only through a comprehensive process of genuine community planning that will so far as possible rectify the mistakes of the past and prevent their repetition in the future.[5]

Also, as stated by the Mississippi Supreme Court in *Dodd v. City of Jackson*:[6]

> There is much merit in the theory of overall planning, namely, where it can be reasonably anticipated that a certain area will become a part of a city in a reasonable time, it is better to take it in and develop the same properly and wisely, with particular reference to a uniform system for securing water, the development of streets, and the collection and disposal of sewage and waste, rather than to let the area develop in a harum-scarum manner as each builder or developer may determine. *Instances of the lack of uniform planning in laying out streets, water lines, and sewage disposal in the towns and cities can be seen on every hand.*[7]

There are, in addition, several other compelling reasons for permitting a municipality to annex adjacent, unincorporated territory with a minimum of conflict and red tape when such extension is shown to be both reasonable and necessary. These compelling reasons arise: (1)

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[4]Note, *Municipal Annexation: Florida's Continuing Problem*, 17 U. FLA. L. REV. 129 (1964). Also, those in the fringe areas may have less efficient, poorer services which are more expensive. Comment, *Municipal Corporations—Annexation Standards and Procedures: A Proposal*, 46 ORE. L. REV. 458 (1967).

[5]MAXEY, AN OUTLINE OF MUNICIPAL GOVERNMENT 180 (1925), *as quoted in* Note, *Annexation and the Law in South Carolina*, *supra* note 3, at 259.

[6]238 Miss. 372, 118 So. 2d 319 (1960).

[7]*Id.* at 396, 118 So. 2d at 330 (emphasis added).

Where the leadership in the area sought to be annexed is unable or has failed to provide adequate police and fire protection. Such insufficiencies threaten the safety of both the municipality's inhabitants who may venture into or reside near such areas and the inhabitants of those areas. (2) Where the lack of health and sanitation ordinances in the area to be annexed results in unsanitary conditions such as faulty septic tanks, poor drainage systems, stream pollution, or improper garbage disposal. Such conditions constitute health hazards to the inhabitants of both the fringe area and the municipality. (3) Where the tax base in the fringe area is insufficient to finance adequate street and sewer construction and lighting installation along these streets. These maintenance inadequacies also create safety hazards. And (4) where less stringent zoning ordinances outside the municipality conflict with the municipality's ordinances, thereby lowering the value of the outer band of real property within municipal limits. Also, inclusion of this territory could lead to an upward rezoning of the area annexed with an attendant increase in the value of the property. If the fringe area were annexed, the municipality could provide these alterations, services, and improvements.[8]

Municipalities also need broad annexation powers to prevent the possibility of being encircled and choked by the incorporation of surrounding suburban areas. With the increase of business and industry inside the municipality has come an exodus by its inhabitants into the suburban areas. This "move to the suburbs" has caused an increase in the number of governmental units, with resulting municipal "fragmentation" of the larger metropolitan area.[9] This outward flow of residents greatly depletes the municipality's tax base, and, if the municipality is not allowed sufficient latitude in annexing adjacent areas, could result in the municipality's inability to provide adequate services. This inability would in turn lead to loss of business and industry within the municipality—the same business and industry which induced population growth in the area in the first place. The inability of municipalities to annex where reasonable and to prevent incorporation of areas which exist only because of the development of the original municipality will lead to the destruction of the centers of urbanization and industrialization in Mississippi.

With the need for broad annexation power to ensure the continued

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[8]*See* D. Hagman, Urban Planning and Land Development Control Law 62 (1971); Cullen & Noe, *Stumbling Giants—A Path to Progress Through Metropolitan Annexation*, 39 Notre Dame Law. 57 (1963).

[9]Comment, *Municipal Corporations—Annexation Standards and Procedures: A Proposal, supra* note 4, at 458 (*Fragmentation* is the existence of many independent government units within a metropolitan area which is socially, economically, and in practicality a single city).

growth and viability of Mississippi's present and future municipalities clearly in mind, the remainder of this article will be devoted to an analysis of the major aspects of municipal annexation law. The first section will involve a consideration of the more frequent constitutional issues which have been adjudicated in the course of municipal annexation proceedings through the years. The second section will, through a discussion of the appropriate statutes and the Mississippi Supreme Court decisions interpreting them, delineate and analyze the statutory annexation procedure in Mississippi. The third section will be devoted to a practical analysis of pre-trial preparation and trial techniques which should be helpful in preparing a municipality's case for a Mississippi chancery court hearing on the reasonableness of the municipality's annexation ordinance. Special attention will be directed toward the types of evidence; *i.e.*, documentary and oral, and the expert witnesses necessary to ensure that the validity of a municipal annexation ordinance will be upheld. The fourth section will discuss briefly several important additional aspects of annexation law which are not appropriate for inclusion within the previous sections.

It is the intent and hope of the authors that the materials presented in this article will be of value to any Mississippi attorney preparing for a hearing on the reasonableness of an ordinance expanding a municipality's boundaries.

I. Constitutional Objections to Municipal Annexation Procedures

Through the years numerous constitutional objections have been waged against municipalities' attempts to expand their boundaries. All of these constitutional complaints have been successfully countered. This section will deal with the more frequent constitutional contentions raised by objectors and with the courts' resolutions of the issues involved.

A. Denial of Due Process and Equal Protection

Many objectors have asserted that the enforcement of municipal annexation ordinances which are passed without or against the consent of those residing in the area to be annexed (as in Mississippi[10]) constitutes an unconstitutional denial of equal protection and a taking of property without due process of law in violation of the 5th and 14th amendments of the U.S. Constitution and similar clauses in state constitutions. Specifically their arguments are that the persons whose

[10]Miss. Code Ann. § 21-1-27 (1972), *formerly* § 3374-10, Miss. Code Ann. (1956), provides that the municipal authorities may pass annexation ordinances. Inhabitants of the area proposed to be annexed are not given an opportunity to vote on the ordinance.

properties are to be annexed are not given a voice in the decision and their properties will become subject to ad valorem taxation to satisfy general obligation bonds previously issued by the municipality.[11]

1. Taxation to satisfy prior debts

Fortunately, the courts have held that automatic subjection of annexed territory to taxation for prior debts does not constitute the taking of property without due process of law or the denial of equal protection.[12] If subjected to a contrary ruling, it would be practically impossible for a municipality to annex territory, since most municipalities have existing general obligation bonded indebtedness.[13]

The general rule is that property brought within the corporate limits of a city by annexation proceedings is subject to the discharge of any municipal indebtedness previously incurred and presently existing.[14] As McQuillin states in *The Law of Municipal Corporations*:

> The legislature has unquestioned power to provide by statute, upon the municipal division or annexation of territory, for a fair and equitable disposition or division of public property, *for the adjustment of preexisting rights and liabilities*, and for the payment of the value of improvements in annexed subdivisions. The validity and constitutionality of statutes designed for these purposes have, in general, been upheld. Although the legislature has power to change the boundaries of a municipality without apportioning its indebtedness, it is usual to make provision respecting the apportionment of property and debts on a change of boundaries of a city or village, or other municipal district or corporation.[15]

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[11]*See, e.g.*, Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683, *motion for stay overruled and motion to issue mandate to trial court sustained*, 253 Miss. 824, 180 So. 2d 154, *motion for stay overruled*, 253 Miss. 826, 180 So. 2d 641 (1965), *appeal dismissed*, 383 U.S. 574 (1966); Barnes v. Kansas City, 359 Mo. 519, 222 S.W.2d 756, 10 A.L.R.2d 553 (1949).

[12]See 2 E. McQuillin, The Law of Municipal Corporations § 7.48 (3d rev. ed. 1966), and cases cited therein.

[13]Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966). *Bridges* was held controlling when the same objections were raised in Butler v. City of Gulfport, 253 Miss. 738, 179 So. 2d 3 (1965).

[14]2 E. McQuillin, *supra* note 12, at § 7.47; *see, e.g.*, Hunter v. City of Pittsburg, 207 U.S. 161 (1907); Kelly v. City of Pittsburg, 104 U.S. 78 (1881). Though taxes should be uniform throughout the city, the legislature may provide a different rate of taxation in the old and new limits if the state constitution does not forbid it. United States v. Memphis, 97 U.S. 284 (1877). Also, the legislature may change the boundaries of a municipality without apportioning its indebtedness. Board of Comm'rs of Laramie County v. Board of Comm'rs of Albany County, 92 U.S. 307 (1876).

[15]2 E. McQuillin, *supra* note 12, at § 7.47 (emphasis added and footnotes omitted).

The Mississippi Supreme Court, in *Martin v. Dix*,[16] held that the act of extending a municipality's boundaries is not unconstitutional as depriving the people of the annexed territory of their property without just compensation through the means of illegal taxation. The court determined that the limitations expressed in the fifth amendment to the United States Constitition apply solely to the federal government and not to the individual states.[17] The Mississippi Supreme Court, in *Forbes v. City of Meridian*,[18] again upheld the validity of an annexation ordinance in the face of "taxation without representation" objections. The court stated that it was proper to tax the annexed properties for previously incurred municipal obligations since in return the owners of these properties received many benefits such as lower insurance and water rates, street maintenance, garbage pickup and disposal, use of the municipality's recreational facilities, and fire and police protection.[19] Under such circumstances, due process is not denied to residents and property owners in the annexed area.[20] In fact, annexation may be proper though no services will be furnished within the annexed area.[21]

A municipality, however, may not tax annexed territory for the year of annexation if such territory was not within the municipality on July 1 of that year.[22]

Conversely, the municipality may be required, upon annexation of an area, to pay presently existing debts of the area, or to assume a proportion of the indebtedness of the district from which the area was taken, provided the annexation was legal.[23] As stated in *Fabric Fire Hose*

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[16]52 Miss. 53, 24 Am. R. 661 (1876).

[17]*Id.* at 58, 24 Am. R. at 663. Of course, parts of the fifth amendment do apply to state government today. *See* Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965), and cases cited therein. While the fifth amendment provision against taking private property without just compensation has not been "incorporated," such is unnecessary, as all 50 states have similar clauses in their state constitutions. *See, e.g.*, MISS. CONST. art. 3, § 17.

[18]86 Miss. 243, 38 So. 676 (1905).

[19]*Id.* at 253, 38 So. at 678. The paramount considerations in extending corporate limits are: (1) that the benefits incident to civic government may be extended to inhabitants of adjacent territory included in the annexation; and (2) that the municipality, by extending its government, fire and police protection, and health regulations, may thereby conserve the best interests of the inhabitants within its original borders and give to those living in the annexed territory more efficient protection against fire damage and against the danger from disease and pestilence. *Id.* at 252, 38 So. at 678.

[20]2 E. MCQUILLIN, *supra* note 12, at § 7.23a.

[21]State v. City of Nashville, 208 Tenn. 290, 345 S.W.2d 874 (1961).

[22]MISS. CODE ANN. § 27-35-3 (1972), *formerly* § 9745, MISS. CODE ANN. (1950).

[23]2 E. MCQUILLIN, *supra* note 12, at § 7.47; *see, e.g.*, Board of Comm'rs of Laramie County v. Board of Comm'rs of Albany County, 92 U.S. 307 (1876).

Co. v. City of Vicksburg,[24] the municipality is not liable for the debts of any territory which has been illegally annexed.

2. Lack of Consent

In answering the equal protection—lack of consent argument proffered by persons residing in an area proposed to be annexed, it is important to remember that these individuals have in fact already made the choice to live in an urban community and to obtain their livelihood from that community;[25] that an individual's desires must succumb to the paramount interest of the community;[26] and that it is the very nature of a democratic society that the will and best interests of the majority be allowed to control.[27] Annexation should be determined on the basis of the needs of the area and not on the selfish wishes of individuals affected. Withholding of consent by those affected could lead to poor building regulations next to the municipality, resulting in lower municipal property values, and possibly the creation of safety hazards. Also, problems of planning, zoning, health, safety, and municipal finance would become extremely burdensome.[28]

Concerning the actual *legality* of annexation without consent, it is generally felt that the power of a state legislature over the boundaries of the state's municipalities is absolute, and that a state legislature may authorize an extension of municipal boundaries without the consent of the inhabitants of the annexed territory.[29] For example, in *Hunter v. City of Pittsburgh*,[30] the United States Supreme Court upheld a Pennsylvania statute which allowed consolidation of contiguous cities upon a majority vote of all electors of the cities involved. The facts of the *Hunter* case reveal that the majority of the citizens of Allegheny, the city consolidated into Pittsburgh, voted against consolidation, contending that Allegheny had better services and facilities, and was better off financially. Consolidation, they argued, would result in an increase in taxes to Allegheny citizens with the benefit going to Pittsburgh citizens, thus depriving the Allegheny residents of property without due process

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[24]117 Miss. 89, 77 So. 911 (1918).

[25]County of Henrico v. City of Richmond, 177 Va. 754, 788-89, 15 S.E.2d 309, 321 (1941); *see* Comment, *Municipal Corporations—Annexation Standards and Procedures: A Proposal, supra* note 4, at 459.

[26]8 E. McQuillin, The Law of Municipal Corporations § 25.41 (3d rev. ed. 1965).

[27]Comment, *An Analysis of the Annexation Power of Texas Home Rule Cities in View of the Basic Principles of a Good Annexation Law Proposed by the American Municipal Association*, 39 Texas L. Rev. 458, 461 (1961).

[28]*Id.*

[29]Annot., 64 A.L.R. 1335, 1336 (1929). See 2 E. McQuillin, *supra* note 12, at § 7.16, for a list of cases upholding the legality of annexation without consent.

[30]207 U.S. 161 (1907).

of law. The Supreme Court, addressing plaintiff's contention that due process required the approval of a majority of Allegheny citizens, stated, "the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."[31] Also, in *Forbes v. City of Meridian*,[32] the Mississippi Supreme Court stated that, in Mississippi, the city council is granted the power to annex territory under specified conditions without the consent of the property owners in the area to be annexed; and that, in the absence of constitutional prohibition, the grant of such power is valid.

Some objectors have proposed that there should be separate majority approval by municipal residents and residents of the area proposed to be annexed before annexation may be accomplished. However, under this requirement, voters of one area may prevent the annexation even though the majority of the voters in the entire area favor it. Thus, the weight of the vote of those favoring annexation may be diluted, arguably violating the constitutional requirement of one-man one-vote expounded in *Baker v. Carr*.[33]

This question has been litigated, though not in an annexation-election context.[34] For example, the New Mexico Supreme Court, in *State v. State Canvassing Board*,[35] struck down a New Mexico statute requiring a two-thirds favorable vote of those voting in each county and a statewide favorable vote of three-fourths of those voting to amend the state constitution. Following several United States Supreme Court decisions concerning legislative reapportionment (*e.g.*, *Reynolds v. Sims*[36]), the court found no real distinction between legislative reapportionment and voting rights relating to the amendment of the constitution. Under the statute in question, on one proposed amendment 81 percent voted for amendment, but two-thirds favorable vote from each county was not obtained. Consequently, the amendment was defeated and the voting power of the 81 percent was diluted, thus violating the one-man one-vote doctrine.[37]

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[31]*Id.* at 179.

[32]86 Miss. 243, 38 So. 676 (1905).

[33]369 U.S. 186 (1962).

[34]Hagman & Disco, *One-Man One-Vote as a Constitutional Imperative for Needed Reform of Incorporation and Boundary Change Laws*, 2 URBAN LAW. 459, 470 (1970).

[35]78 N.M. 682, 437 P.2d 143 (1968).

[36]377 U.S. 533 (1964).

[37]State v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968); *accord*, Holt v. Richardson, 238 F. Supp. 468 (D. Hawaii 1965) (requirement of a separate majority of voters in each of a majority of the counties to change the representation in the state senate held invalid). *Contra*, Keane v. Golka, 304 F. Supp. 331 (D. Neb. 1969) (the court, stating that there was a valid purpose of bringing into balance the power of the larger and smaller

Hagman and Disco in their article, "One-Man One-Vote as a Constitutional Imperative for Needed Reform of Incorporation and Boundary Change Laws," clearly set forth the fallacy of the separate-majority election concept:

> [I]f the *Reynolds v. Sims* language about the insignificance of local governmental boundary lines is applicable to consolidations, a requirement of separate majorities in each area in consolidations may be invalid. If the majority of the people in an area wish to be in one city, is there a compelling state interest that they can do so only if the people within a local governmental boundary of almost no socioeconomic significance agree by majority vote and likewise the separated group agree by majority vote?[38]

A fortiori, the separate-majority election concept would not be appropriate for the annexation of unincorporated territory. Thus, it appears that the requirement of separate-majority elections would be an unsatisfactory alternative to the present annexation procedure employed in Mississippi, and may even be unconstitutional.

Other objectors have proposed that municipal expansion be approved by a combined majority vote of the voters within the municipality and the area proposed to be annexed prior to the adoption of an annexation ordinance. Such a requirement would be detrimental to the efficient functioning of a state's municipalities. Under Mississippi's current annexation statutes, municipal authorities decide when annexation is warranted.[39] These persons *must* have this authority, since they have the expertise and information necessary to make a calculated decision, keeping the best interest of both the municipality and the annexed area in mind, on the feasibility of annexation of a particular area at a particular time. Even if a majority vote were required, in actuality the decision-making process would remain the same: municipal officials would still decide when annexation is proper. But, in addition to making that decision, the city officials would also have to spend a great deal of time and tax dollars convincing a majority of the residents of both areas that they should vote in favor of the annexation. Such a procedure is an unproductive use of tax dollars and would probably result in the frustration of municipal goals with a concomitant reduction in the desire of municipal officials to create and pursue necessary municipal programs.

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classes of school districts, upheld a separate-majorities scheme for determining school district reorganization).

[38]Hagman & Disco, *supra* note 34, at 472.

[39]Miss. Code Ann. § 21-1-27 (1972), *formerly* § 3374-10, Miss. Code Ann. (1956), gives municipal authorities the power to pass annexation ordinances.

When weighing the desirability of a majority-vote requirement, it is important to remember that: (1) the majority of those residing outside of the municipality will usually be against annexation since they already enjoy the benefits of city dwelling by virtue of proximity, while not having to share its tax burdens; and (2) the majority of present municipal citizens will probably not realize the financial and regulatory demands which compel the annexation of an area at a specified time, until such problems and demands have reached the critical stage.[40] It is imperative for the public good that the municipal authorities, who are aware of the exigencies of the situation, be allowed to initiate annexation proceedings when they determine such action to be reasonable and required by public convenience and necessity. If it ever appears that such power is being abused by municipal officials, dissenters have a viable forum to challenge such municipal action through statutory proceedings in chancery court.[41]

B. Nonjudicial Function

The objection has been lodged that the alteration of municipal boundaries is a legislative matter over which the courts have no jurisdiction or constitutional powers. The objection has been offered in two contexts: first, that the legislature has delegated to the court a function which the legislature should exercise, or second, that the legislature has imposed on the court a function which is nonjudicial in character.[42] It is true that the extension of municipal boundaries is viewed as a political matter, entirely within the power of the state legislature to regulate. But, because such power is vested in the state legislature, it may by statute, in the absence of constitutional restrictions, give to the courts or municipal boards the power to extend municipal boundaries in accordance with specific legislative directives.[43] By the orthodox view these courts and boards are limited to determining the conditions and facts established by the legislature as prerequisites. The courts may only participate in annexation proceedings to the extent that they must decree annexation upon a determination that all conditions precedent set by the legislature have been satisfied.[44]

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[40]*See* Note, *Annexation and the Law in South Carolina, supra* note 3, at 273.

[41]MISS. CODE ANN. § 21-1-31 (1972), *formerly* § 3374-12, MISS. CODE ANN. (1956).

[42]Annot., 69 A.L.R. 266 (1930). In a majority of cases in which the question of the imposition of a nonjudicial function on the courts has received consideration, statutes governing the formation or change of districts and municipalities have not been held violative of the constitutional provisions for separation of powers. *Id.* § III, at 290, and cases cited therein.

[43]2 E. MCQUILLIN, *supra* note 12, at § 7.10.

[44]1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 1.13, at 34 (1973).

The constitutionality of such a statute was sustained by the Mississippi Supreme Court in *Ritchie v. City of Brookhaven*,[45] wherein the annexation statutes were held valid because they only empowered the court to determine reasonableness. The Mississippi statutes which allow annexation pursuant to an ordinance passed by municipal officials subject to chancery court approval are sustained on the ground that the statutes define the conditions and that the courts are merely directed to find the necessary facts.[46]

In Mississippi the objection has been phrased in terms of the improper delegation of legislative functions to the courts.[47] This contention, however, was rejected by the United States Supreme Court as early as 1896 in the case of *Forsyth v. Hammond*.[48] The Court, in holding that matters of territorial boundaries of municipalities are local in nature upon which decisions of state courts are final, stated:

> It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every State in this Union. And whenever the Supreme Court of a State holds that under the true construction of its constitution and statutes the courts of that state have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution.[49]

Although concerning the power of condemnation rather than annexation, the Mississippi Supreme Court's decision in *Culley v. Pearl River Industrial Commission*[50] is illustrative of the manner in which the

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[45]217 Miss. 860, 65 So. 2d 436, *suggestion of error overruled*, 217 Miss. 876, 65 So. 2d 832 (1953).

[46]*See* Ritchie v. City of Brookhaven, 217 Miss. 860, 65 So. 2d 436, *suggestion of error overruled*, 217 Miss. 876, 65 So. 2d 832 (1953); *followed in* Harris v. City of Newton, 238 Miss. 405, 117 So. 2d 199 (1960); *explained in* Smith v. City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959); *commented upon in* Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

[47]Wooten v. Hickahala Drainage Dist., 116 Miss. 787, 77 So. 795 (1918) (courts have authority to hear and decide hearings involving annexation ordinances); *accord*, Board of Sup'rs v. Grable, 111 Miss. 893, 72 So. 777 (1916).

[48]166 U.S. 506 (1897); *accord*, Common Council v. Town Bd., 261 N.Y.S.2d 144 (App. Div. 1965).

[49]Forsyth v. Hammond, 166 U.S. 506, 519 (1897).

[50]234 Miss. 788, 108 So. 2d 390 (1959).

nonjudicial-function complaint has been rejected in Mississippi. In *Culley* objectors to the court's authority asserted that the Act creating the Pearl River Valley Water Supply District and giving the Board of Directors power to determine the amount and character of interests in land, other property, and easements to be acquired by condemnation, violated Section 33 of the Mississippi Constitution by conferring on the judiciary the authority to decide legislative questions. The court answered:

> The dividing line between a legislative and a judicial act is often imperceptible. Traditionally, the Legislature may delegate to a court the power to determine whether certain facts exist which would warrant creation of the District. The findings of fact are conditions to its creation. The findings required of the chancery court . . . are essentially factual in nature, involving, we think, findings of ultimate facts. The statute creates a judicial procedure to determine whether these circumstances and conditions exist. That determination is a function properly exercised by the chancery court. . . . *Somewhat similar is the action of the chancery court in passing on the validity of an extension of municipal limits.* Ritchie v. City of Brookhaven, 1953, 217 Miss. 860, 65 So.2d 436, 832.[51]

And in *Rouse v. City of Pascagoula*,[52] a municipal incorporation case, the court stated that "[deciding] *the question of reasonableness is a judicial function.*"[53]

II. Statutory Requirements

The following consists of enumeration and analysis of the more important Mississippi annexation statutes, and should provide the reader with a working knowledge of the statutory requirements for municipal annexation. The basic annexation procedure is dictated by a special set of statutes (§§ 21-1-27 to -41).[54] These special statutes take precedence over statutes dealing with municipal ordinances generally. Any time there is a conflict, the annexation statutes will control.[55]

Briefly, the statutory procedure which should be followed when a municipality seeks to expand its boundaries is as follows: First, an an-

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[51]*Id.* at 809, 108 So. 2d at 397 (emphasis added).

[52]230 So. 2d 543 (Miss. 1970).

[53]*Id.* at 547 (emphasis added).

[54]Miss. Code Ann. §§ 21-1-27 to -41 (1972), *formerly* §§ 3374-10 to -16, Miss. Code Ann. (1956).

[55]*See, e.g.*, City of Biloxi v. Cawley, 278 So. 2d 389 (Miss. 1973); Lippian v. Ros, 253 Miss. 325, 175 So. 2d 138 (1965). *See also* Delta Elec. Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 482, 149 So. 2d 504 (1963); Yerger v. Town of Greenwood, 77 Miss. 378, 27 So. 620 (1900); Brown v. Beatty, 34 Miss. 227 (1857).

nexation ordinance must be passed.[56] Next, a petition must be filed in chancery court praying that the enlargement of the boundaries be ratified, approved, and confirmed by the court.[57] Once the petition has been filed, the chancellor will fix a day for the hearing. Notice must then be given to all persons interested in, affected by, or having objections to the annexation, including all municipalities within 3 miles of the area to be annexed.[58] At the hearing the chancellor must decide from the evidence whether the enlargement is reasonable. If he finds the enlargement to be reasonable, he will enter a decree accordingly, and the annexation will become final 10 days thereafter.[59] If the municipality or any interested person feels aggrieved by the decree, then such person or municipality may prosecute an appeal to the supreme court within 10 days from the date of the decree.[60] Within 10 days after the final adjudication affirming annexation, either by chancery decree or supreme court mandate, the chancery clerk must forward a certified copy of the decree to the secretary of state to be filed as a permanent record of the annexation.[61] Also, the municipal authorities must furnish the chancery clerk with a map or plat of the boundaries of the municipality as altered to be recorded in the official plat book of the county.[62] Finally, the municipality, in compliance with the United States Voting Rights Act of 1965, must obtain approval of the ordinance in the United States District Court for the District of Columbia or from the United States Attorney General before municipal elections may be held.[63]

A more detailed discussion of the statutes mentioned above follows.

A. The Ordinance (§ 21-1-27)[64]

1. Generally

Initially, in all annexation proceedings, an ordinance, defining with certainty the territory proposed to be included and the entire boundary as changed, must be passed by the governing authorities of the municipality. The ordinance must describe: (1) the improvements proposed to be made in the annexed territory, (2) the manner and extent of such improvements, (3) the approximate time within which such improve-

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[56]Miss. Code Ann. § 21-1-27 (1972), *formerly* § 3374-10, Miss. Code Ann. (1956).

[57]Miss. Code Ann. § 21-1-29 (1972), *formerly* § 3374-11, Miss. Code Ann. (1956).

[58]Miss. Code Ann. § 21-1-31 (1972), *formerly* § 3374-12, Miss. Code Ann. (1956).

[59]Miss. Code Ann. § 21-1-33 (1972), *formerly* § 3374-13, Miss. Code Ann. (1956).

[60]Miss. Code Ann. § 21-1-37 (1972), *formerly* § 3374-14, Miss. Code Ann. (1956).

[61]Miss. Code Ann. § 21-1-39 (1972), *formerly* § 3374-15, Miss. Code Ann. (1956).

[62]Miss. Code Ann. § 21-1-41 (1972), *formerly* § 3374-15, Miss. Code Ann. (1956).

[63]42 U.S.C. § 1973c (1970). The Act is effective through August 6, 1975. Act of June 22, 1970, Pub. L. No. 91-285, 84 Stat. 314, 315.

[64]Miss. Code Ann. § 21-1-27 (1972), *formerly* § 3374-10, Miss. Code Ann. (1956).

ments are to be made, and (4) the municipal services which the municipality proposes to render in such annexed territory.[65] Additionally, the annexation ordinance must contain only one subject.[66] But the inclusion and exclusion of property constitutes only one subject since the intention was that one subject would be changing boundaries—whether it be to modify, enlarge, limit, or change them in some other way.[67]

Compliance with this section is mandatory,[68] but does not limit the city authorities' right to proceed under this statute as often as they believe the proposed enlargement is reasonable and required by the then public convenience and necessity.[69] *Ritchie v. City of Brookhaven*[70] defined the degree of specificity necessary for an acceptable annexation ordinance. In *Ritchie* the court held that an annexation ordinance which set forth the improvements to be made in the annexed territory *in general terms* (this language is found in the statute), and which provided that such improvements would be made when necessary and economically feasible, sufficiently complied with the statutory requirements of a description of the improvements and the manner and extent thereof.[71]

White v. Town of Drew,[72] held that this section does not require that the municipality ascertain, prior to executing the ordinance, the precise cost of the improvements described in the ordinance, or the sources of materials for such improvements. This vesting of discretion within the municipal authorities is appropriate since the availability and cost of materials fluctuate during the hearings on the ordinance.[73] The court further stated that the use of the words "approximate time"[74] and "within a reasonable time"[75] indicates a legislative intent to vest broad discretion in the governing bodies of our municipalities.[76] Nevertheless, the availability of materials, their cost, and the city's financial ability

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[65]*Id. See also* Ferguson v. Town of Vaiden, 242 So. 2d 124 (Miss. 1970); Butler v. City of Gulfport, 253 Miss. 738, 179 So. 2d 3 (1965).

[66]MISS. CODE ANN. § 21-13-9 (1972), *formerly* § 3374-74, MISS. CODE ANN. (1956).

[67]Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960).

[68]*Id.*

[69]*In re* Extension of Boundaries of Indianola, 226 Miss. 760, 85 So. 2d 212 (1956).

[70]217 Miss. 860, 65 So. 2d 436, *suggestion of error overruled*, 217 Miss. 876, 65 So. 2d 832 (1953).

[71]*Id.* at 874, 65 So. 2d at 441. *See also* Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966).

[72]214 Miss. 147, 58 So. 2d 372 (1952).

[73]*Id.* at 152, 58 So. 2d at 375.

[74]This language, found in section 21-1-27, concerns the time limit the municipality must set for construction of proposed improvements.

[75]This language is found in section 21-1-33. In this section it is stated that the chancellor must find that the improvements will be made "within a reasonable time" before he may ratify the ordinance.

[76]214 Miss. at 152, 58 So. 2d at 375.

to meet that cost are relevant in determining whether services can be rendered within a reasonable time.[77]

2. Signing and Recordation

Section 21-1-27 does not mention whether the municipal ordinance must be signed, recorded in the ordinance book, and recorded in the minute book pursuant to sections 21-13-11[78] and 21-15-33[79] which govern the signing and recordation of general municipal ordinances. It is suggested, therefore, that every precaution be taken to have the ordinance prepared, signed, and recorded in such a way that it will satisfy sections 21-13-11 and 21-15-33 dealing with ordinances generally and section 21-1-27 which controls annexation ordinances.

A conflict may arise among these statutes, however, regarding the time within which the ordinance must be recorded in the ordinance book. There is no definite provision for the time of recordation in section 21-1-27, while section 21-13-11 requires that a municipal ordinance be recorded immediately upon passage. Remembering that special statutes control over general statutes,[80] it seems that it will be sufficient to follow only the annexation statute, and, therefore, that recordation will not be required until the hearing is completed and the decree becomes final. This point was discussed in *City of Biloxi v. Cawley*,[81] wherein the court stated: "It is to be doubted that an annexation ordinance should be recorded in the ordinance book until after it shall have been approved by decree of the chancery court in statutory proceedings."[82]

In summary, to ensure that signing and recordation procedures are effective, in addition to the procedures set out in section 21-1-27, the careful practitioner should see to it that the requirements of sections 21-13-11 and 21-15-33 are also met. These sections require that, after pas-

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[77]*Id.* at 152, 58 So. 2d at 375. In *White* the court found that the ordinance was reasonable where the city had an assessed valuation of approximately $2 million with a present bonded indebtedness of $6,000, funds on hand in excess of $114,000, and an estimation that the cost of extending water lines and fire protection facilities would be approximately $2,000. *Id.*

[78]Miss. Code Ann. § 21-13-11 (Supp. 1973), *formerly* § 3374-72, Miss. Code Ann. (Supp. 1972).

[79]Miss. Code Ann. § 21-15-33 (Supp. 1973), *formerly* § 3374-72, Miss. Code Ann. (Supp. 1972). Section 21-15-33 changes the time within which municipal minutes must be signed from 10 to 22 days. This 22-day period commences upon final and complete adjournment of the official municipal meeting. City of Biloxi v. Cawley, 278 So. 2d 389 (Miss. 1973) (period commences upon final adjournment, not upon the holding of an interim adjourned meeting prior to final adjournment of the official municipal meeting).

[80]*See* note 55 and accompanying text *supra*.

[81]278 So. 2d 389 (Miss. 1973).

[82]*Id.* at 393.

sage, the ordinance be: (1) certified by the municipal clerk, (2) signed by the mayor or majority of all the members of the governing body, (3) recorded in the ordinance book, (4) published at least one time in some newspaper published in such municipality,[83] and (5) recorded in the city minutes which should be signed within 22 days of the last day of the municipal meeting.[84]

3. Limitations and Exceptions

Several limitations have been imposed upon the application of section 21-1-27 by requirements found in other statutes:

State institutions. Under the provisions of section 21-1-59, a municipality may not annex any of the buildings or grounds of a state institution without first obtaining written consent from the board of trustees or other governing body of such institution.[85] The Mississippi Supreme Court, however, has interpreted "any buildings or grounds of any state institution," to exclude state armories or lands on which transportation vehicles for county schools are stored and repaired.[86]

Combination of Municipalities. Municipalities may be combined only upon the consent of the governing authorities of all municipalities involved.[87] Thus, an annexation ordinance by one municipality which includes any property within the limits of another municipality is void unless the governing authorities of such other municipality consent.[88] However, territory within the municipal school district of one city may be annexed by another, provided the territory is not within the first municipality.[89]

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[83]MISS. CODE ANN. § 21-13-11 (Supp. 1973), *formerly* § 3374-72, MISS. CODE ANN. (Supp. 1972). Technically only the notice requirements set forth in section 21-1-31 (*see* note 106 and accompanying text *infra*) must be met when seeking approval of an annexation ordinance; however, it is suggested, to prevent any question of error, that the notice requirement of section 21-13-11 should also be satisfied.

[84]MISS. CODE ANN. § 21-15-33 (Supp. 1973), *formerly* § 3374-72, MISS. CODE ANN. (Supp. 1972). The ordinance, as it appears on the minute book, does not need to be signed if the minutes have been signed by the mayor or majority of the governing body of the municipality and certified by the municipal clerk.

[85]MISS. CODE ANN. § 21-1-59 (1972), *formerly* § 3374-18, MISS. CODE ANN. (1956). *See also* Vail v. City of Jackson, 206 Miss. 299, 40 So. 2d 151 (sustaining motion to advance), 41 So. 2d 357 (1949) (court held that there was no state property within the area proposed to be annexed).

[86]*In re* Hazelhurst, 247 Miss. 527, 153 So. 2d 809 (1963).

[87]MISS. CODE ANN. § 21-1-43 (1972), *formerly* § 3374-17, MISS. CODE ANN. (1956). This section enumerates the procedure to perfect such a combination.

[88]City of Pascagoula v. Krebs, 151 Miss. 676, 118 So. 286 (1928) (ordinance is subject to collateral attack, see notes 157 & 158 and accompanying text *infra*); Village of Gandsi v. Town of Seminary, 95 Miss. 315, 48 So. 908 (1909).

[89]Butler v. City of Gulfport, 253 Miss. 738, 179 So. 2d 3 (1965); City of Pass Christian

Also, section 21-1-27 only permits annexation of "adjacent unincorporated territory."[90] However, there are several exceptional circumstances (discussed below) in which non-adjacent, unincorporated territory may be annexed:

Airports. Any incorporated municipality which establishes or acquires an airport or air navigational facility which is located within 10 miles of the municipal limits may by ordinance[91] incorporate such airport or air navigation facility into its corporate boundaries.[92]

It does not matter whether such airport or air navigational facility is within the same county as, or adjacent or contiguous to the incorporated municipality.[93] If, however, the airport is located in another county, after incorporation of the airport the municipality may not extend its boundaries into such other county without first complying with all existing laws governing extension of corporate boundaries and without first obtaining the consent and approval of the board of supervisors of the county into which the municipality desires to extend.[94]

Islands. The authorities of a municipality bordering on the Mississippi Sound or Gulf of Mexico, containing a port or harbor through which commerce flows and at least one seafood industry,[95] may incorporate into the municipality any island which is situated in the Mississippi Sound or Gulf of Mexico, and lying within 3 leagues of the nearest point of the corporate limits of such municipality.[96] Incorporation should be accomplished in the same manner and under the same conditions as presently provided by statute for the incorporation of adjacent lands into municipalities.[97]

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v. Town of Long Beach, 157 Miss. 778, 128 So. 554 (1930).

[90]Miss. Code Ann. § 21-1-27 (1972), *formerly* § 3374-10, Miss. Code Ann. (1956).

[91]Miss. Code Ann. § 61-9-3 (1972), *formerly* § 7545-71, Miss. Code Ann. (Supp. 1972). This section enumerates the details and effects of such an ordinance.

[92]Miss. Code Ann. § 61-9-1 (1972), *formerly* § 7545-71, Miss. Code Ann. (Supp. 1972). Any person aggrieved by a city's incorporation of an airport may appeal to the circuit court of the county in which the principal office of the municipality is located. The appeal must be taken in the manner provided for appeals from judgments or decisions of municipal authorities as set forth in Mississippi Code Annotated § 11-51-75 (1972). Miss. Code Ann. § 61-9-7 (1972), *formerly* § 7545-73, Miss. Code Ann. (Supp. 1972).

[93]Miss. Code Ann. § 61-9-1 (1972), *formerly* § 7545-71, Miss. Code Ann. (Supp. 1972).

[94]Miss. Code Ann. § 61-9-5 (1972), *formerly* § 7545-74, Miss. Code Ann. (Supp. 1972).

[95]Miss. Code Ann. § 55-7-3 (1972), *formerly* § 5974-01, Miss. Code Ann. (Supp. 1972).

[96]Miss. Code Ann. § 55-7-13 (1972), *formerly* § 5974-04, Miss. Code Ann. (Supp. 1972).

[97]Miss. Code Ann. § 55-7-53 (1972), *formerly* § 5974-12, Miss. Code Ann. (Supp. 1972).

B. The Petition (§ 21-1-29)[98]

After passing the ordinance, the municipal authorities must file a petition in the chancery court of the county in which the municipality is located. If, however, the land to be annexed is within an adjoining county, the petition must be filed in the chancery court of the county in which the land is located.[99]

The statutory requirements for the petition, which are explicitly stated in section 21-1-29, should be carefully followed. In addition, and just as importantly, the requirements of section 21-1-27, concerning the municipal ordinance,[100] and section 21-1-31, setting forth the notice requirements, should be satisfied.[101] The authors suggest that the basic requirements of these statutes will be satisfied if the petition includes the following points:

> (1) A general paragraph describing the municipality, and stating that the municipality is incorporated and situated in the county and judicial district in which the petition is being filed.
> (2) A paragraph concerning the annexation ordinance which recites that:
> (a) the annexation ordinance was duly and legally adopted;[102]
> (b) a certified copy of the annexation ordinance is attached and incorporated by reference;
> (c) a copy of the ordinance was published in a paper of general circulation in the municipality and county as required by section 21-1-31;
> (d) by said ordinance the territory described therein is proposed to be included in the corporate limits and boundaries of the municipality;
> (e) the ordinance describes the corporate limits and boundaries of the municipality as extended by the ordinance; and
> (f) the ordinance describes in general terms the proposed improvements to be made in the annexed territory, the manner

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[98]MISS. CODE ANN. § 21-1-29 (1972), *formerly* § 3374-11, MISS. CODE ANN. (1956).

[99]*Id.*

[100]MISS. CODE ANN. § 21-1-27 (1972), *formerly* § 3374-10, MISS. CODE ANN. (1956). *See* notes 64 through 77 and accompanying text *supra*, for a more detailed discussion of section 21-1-27.

[101]MISS. CODE ANN. § 21-1-31 (1972), *formerly* § 3374-12, MISS. CODE ANN. (1956). *See* notes 104 through 109 and accompanying text *infra*, for a more detailed discussion of section 21-1-31.

[102]When the ordinance is filed as an exhibit with the petition, it is not necessary for the city to introduce a copy of the ordinance into evidence. Smith v. City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959). The exhibit itself becomes a part of the record. MISS. CODE ANN. § 11-7-45 (1972), *formerly* § 1469, MISS. CODE ANN. (1956).

and extent of such improvements, the approximate time within which the improvements are to be made, and the municipal services which the municipality proposed to render in such annexed territory.

(3) A paragraph stating that a map or plat of the municipal boundaries as they will exist if the enlargement becomes effective is attached as an exhibit to the petition.

(4) A paragraph naming all municipalities within 3 miles of the municipal boundaries as enlarged and stating that they are made parties defendant pursuant to the provisions of section 21-1-31.

(5) A paragraph stating that the municipality will show unto the court that the enlargement of the municipal boundaries is reasonable and required by the public convenience and necessity.

(6) A paragraph praying for relief. The prayer should request that the chancellor fix a date for the hearing and that notice be given to all parties interested in, affected by, or being aggrieved by the proposed enlargement as required by section 21-1-31, and, further, that process issue to the municipalities within 3 miles of the proposed extended boundaries as required by these statutes.The prayer for relief, of course, should also include a request that upon the final hearing the court will enter its decree ratifying, approving and confirming the proposed extension.

Also, qualified electors residing within incorporated territory adjacent to any municipality may petition for inclusion in such municipality, and residents of a municipality may petition for exclusion.[103]

C. *Notice* (§ 21-1-31)[104]

After the petition has been filed in the chancery court, the chancellor must set a date for a hearing on the petition.[105] Once the date has been set, notice must be published once a week for 3 consecutive weeks in a newspaper having general circulation in the territory to be annexed, and be posted in three or more public places in such territory. The first publication and posting of notice must occur at least 30 days prior to the date set for hearing. The notice must contain a full description of the territory proposed to be annexed.[106]

If the territory proposed to be annexed is located within 3 miles of another existing municipality, then that other municipality must be made a party defendant and must be served with process in the manner

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[103]Miss. Code Ann. § 21-1-45 (1972), *formerly* § 3374-19, Miss. Code Ann. (1956). *See* Ferguson v. Town of Vaiden, 242 So. 2d 124 (Miss. 1970).

[104]Miss. Code Ann. § 21-1-31 (1972), *formerly* § 3374-12, Miss. Code Ann. (1956).

[105]An annexation proceeding may be heard in term time or in vacation. *Id.*

[106]*Id.*

provided by law, at least 30 days prior to the date set for hearing.[107]

Proof of such publication according to statutory requirements is not a requisite part of the record on appeal from an annexation ordinance.[108] Also, where a petition for annexation literally complies with the statute, it is not necessary that the petition allege that the ordinance was published as required by law.[109]

D. The Chancery Court Hearing—Legal Requirements (§ 21-1-33)[110]

Section 21-1-33 empowers the chancellor to enter a decree approving the proposed enlargement upon a finding that such enlargement: (1) is reasonable, (2) is required by public convenience and necessity, and (3) ensures that reasonable public and municipal services will be rendered in the annexed territory within a reasonable time.[111]

The significance of and proof necessary to satisfy the requirements of this section can best be understood through an analysis of the cases interpreting its three components.

1. Reasonableness

In *Dodd v. City of Jackson*[112] the Mississippi Supreme Court established the following general criteria for determining the reasonableness of an annexation ordinance: (1) *The municipality's need for expansion.* Here the municipality should put forth proof of its growth in population and area from the time of its incorporation to the present, and a projection of the future growth.[113] (2) *Whether the area sought to be annexed is reasonably within the path of such growth.* Here the municipality should employ expert testimony to reveal obstacles to expansion, available area within present limits, presently developed area in the annexed territory, terrain study of the area showing suitability for residential subdivision development, and the time span in which the territory will

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[107] *Id.*

[108] City of Pass Christian v. Town of Long Beach, 157 Miss. 778, 128 So. 554 (1930).

[109] Ritchie v. City of Brookhaven, 217 Miss. 860, 65 So. 2d 436, *suggestion of error overruled*, 217 Miss. 876, 65 So. 2d 832 (1953).

[110] MISS. CODE ANN. § 21-1-33 (1972), *formerly* § 3374-13, MISS. CODE ANN. (1956). Objectors to an annexation ordinance are not entitled to a jury trial. As stated in Smith v. City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959), the right to a trial by jury applies only to cases where a jury was necessary according to common law, and an annexation proceeding is not such a case. *See also* Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).

[111] MISS. CODE ANN. § 21-1-33 (1972), *formerly* § 3374-13, MISS. CODE ANN. (1956).

[112] 238 Miss. 372, 118 So. 2d 319 (1960).

[113] *E.g.*, *id.* at 384, 118 So. 2d at 324. *See* note 170 and accompanying text *infra*, for a more detailed discussion of the type of proof which should be offered.

be needed.[114] In determining the reasonableness of the ordinance, the extension as a whole must be considered, and not whether each portion, if considered separately, should be included.[115] (3) *The potential health hazard from sewerage and waste disposal in the annexed area.* Here the city should put forth proof of the widespread use of septic tanks in the area to be annexed and any sewage or garbage discharge into water courses which flow through the municipality, either of which would very probably create a health hazard within the annexed territory and the municipality.[116] (4) *The municipality's financial ability to make the improvements and furnish municipal services promised.* Here the municipality should put on proof of its past annexation record and financial status, present financial condition, assessed valuation of property within the municipality, its bond rating, and a feasibility study showing the cost of proposed improvements and demonstrating the municipality's ability to finance these improvements.[117]

Several other factors have also been given substantial weight by the Mississippi Supreme Court in determining the reasonableness of annexation ordinances. First, in several instances the court has found an annexation ordinance reasonable where evidence revealed that persons in the area proposed to be annexed were already using municipal facilities such as schools, water and sewer systems, and fire protection.[118] Secondly, the court has approved ordinances where it appeared that annexation was necessary to ensure the safety of the inhabitants of both the annexed area and the municipality. Often, developed areas adjacent to a municipality have high crime rates but insufficient tax bases to afford adequate law enforcement manpower, and, since the city authorities have no jurisdiction, the result is unchecked crime which threatens inhabitants of both the adjacent area and the municipality. Therefore, the court will allow annexation so that the municipality may have jurisdiction over and enforce laws within the area.[119] And thirdly, the credi-

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[114]*E.g.*, Dodd v. City of Jackson, 238 Miss. 372, 385, 118 So. 2d 319, 325 (1960). *See* note 171 and accompanying text *infra*, for a more detailed discussion of the type of proof which should be offered.

[115]Forbes v. City of Meridian, 86 Miss. 243, 38 So. 676 (1905) (ordinance reasonable although a portion of the area was underdeveloped and unsuitable for development).

[116]*E.g.*, Dodd v. City of Jackson, 238 Miss. 372, 389, 118 So. 2d 319, 327 (1960). *See* note 172 and accompanying text *infra*, for a more detailed discussion of the type of proof which should be offered.

[117]*E.g.*, Dodd v. City of Jackson, 238 Miss. 372, 393, 118 So. 2d 319, 328 (1960). *See* note 178 and accompanying text *infra*, for the type of proof which should be offered.

[118]*E.g.*, Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966); Parker Gin Corp. v. Town of Drew, 214 Miss. 147, 58 So. 2d 372 (1952).

[119]*E.g.*, Butler v. City of Gulfport, 253 Miss. 738, 179 So. 2d 3 (1965); Walker v. City of Moss Point, 252 Miss. 511, 175 So. 2d 173 (1965); White v. Town of Drew, 214 Miss.

bility assigned the municipal officials by the chancellor has been an important factor in some cases.[120]

Conversely, the return of revenue from the territory to be annexed is not a proper criterion by which to judge the reasonableness of an ordinance.[121] Nor is a municipality's desire to install a sanitary sewerage system in the territory at the same time it is installed within the municipality a sufficient ground for annexation.[122]

In a hearing on an annexation ordinance, the burden of proof is upon the municipal authorities. They must show that the proposed enlargement is reasonable.[123] If, however, the qualified electors of an area, pursuant to section 21-1-45,[124] initiate proceedings to include such area within an adjacent municipality, the burden of proof is upon such electors.[125]

After a contingent showing of reasonableness by the municipality, objectors' opinion testimony that voters in the future would vote against a bond issue to provide municipal services to the added areas is too speculative and conjectural to sustain their burden of showing the unreasonableness of the ordinance.[126] Personal opinions of the objectors as to the desirability of annexation are also insufficient to rebut evidence from the entire record which reveals a probability of benefit to citizens

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147, 58 So. 2d 372 (1952).

[120]City of Picayune v. Quick & Grice, Inc., 238 Miss. 429, 117 So. 2d 718 (1960); *In re* Extension of Boundaries of Indianola, 226 Miss. 760, 85 So. 2d 212 (1956).

[121]Forbes v. City of Meridian, 86 Miss. 243, 38 So. 676 (1905).

[122]*In re* Extension of Boundaries of Indianola, 226 Miss. 760, 85 So. 2d 212 (1956).

[123]MISS. CODE ANN. § 21-1-33 (1972), *formerly* § 3374-13, MISS. CODE ANN. (1956). *See, e.g.*, Ferguson v. Town of Vaiden, 242 So. 2d 124 (Miss. 1970); Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 584 (1966); Walker v. City of Moss Point, 252 Miss. 511, 175 So. 2d 173 (1965); *In re* the Extension of Boundaries of Philadelphia, 232 Miss. 582, 100 So. 2d 100 (1958); Spears v. City of Oxford, 227 Miss. 801, 87 So. 2d 61 (1956); *In re* Extension of Boundaries of Indianola, 226 Miss. 760, 85 So. 2d 212 (1956). The burden was placed upon the objectors in White v. Town of Drew, 214 Miss. 147, 58 So. 2d 372 (1952). Several years later, in *In re Extension of Boundaries of Indianola*, the court stated that its placing of the burden on the objectors in the *White* case was erroneous. The court revealed that the error was due to the fact that in the cases decided prior to the enactment of Chapter 491 Laws of 1950 (present statutes), the burden of proof was upon the objectors. 226 Miss. at 765, 85 So. 2d at 214.

In *Ball v. City of Louisville*, decided under the laws in effect prior to our present statutes, the court held that by passage of the ordinance the mayor and alderman had adjudicated that an extension was reasonable and therefore that the burden was on the objectors to overturn the municipality's ruling and to show that the ordinance was unreasonable. 218 Miss. 867, 883, 56 So. 2d 4, 9 (1952).

[124]MISS. CODE ANN. § 21-1-45 (1972), *formerly* § 3374-19, MISS. CODE ANN. (1956). See notes 189 through 191 and accompanying text *infra*, for a discussion of this section.

[125]*In re* Extension of Boundaries of Indianola, 226 Miss. 760, 85 So. 2d 212 (1956).

[126]*In re* the Extension of Boundaries of Philadelphia, 232 Miss. 582, 100 So. 2d 100 (1958).

both of the old and new areas.[127] Moreover, objectors' disinclination to pay municipal taxes also is not a controlling factor against annexation where the property will derive such benefits as lower insurance rates, lower water rates, and better police and fire protection.[128] If, however, no evidence of reasonableness is offered for any portion of the area to be annexed, such portion will be excluded.[129]

2. Required by Public Convenience and Necessity

In *Ritchie v. City of Brookhaven*,[130] it was argued that section 3374-13 (now section 21-1-33) was unconstitutional because it required the chancery court to determine "public convenience and necessity" —arguably a legislative rather than a judicial question. The court did not pass upon this question, but held instead that since the Act itself provided that if any phrase was invalid or unconstitutional such phrase did not affect any other part of the Act, the chancellor could still determine the reasonableness of the ordinance.[131] The *Ritchie* case again reached the Mississippi Supreme Court on suggestion of error. This time the court held that the issue of public convenience and necessity was a legislative question, and that the legislature had constitutional authority to delegate this legislative function to a subordinate body such as a municipal board. Once the municipal board determined that the public convenience and necessity required annexation, the chancery court only determined the factual question of reasonableness, a question within the purview of judicial authority.[132]

All doubt surrounding this issue was settled in *Smith v. City of Meridian* with the court's holding, "that the determination of the public convenience and necessity is a legislative question, and that this was passed upon by the mayor and aldermen when they adopted the ordinance."[133]

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[127]Walker v. Town of Waynesboro, 202 Miss. 830, 32 So. 2d 455 (1947).

[128]*E.g.*, Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960); White v. Town of Drew, 214 Miss. 147, 58 So. 2d 372 (1952); Ball v. City of Louisville, 218 Miss. 867, 56 So. 2d 4 (1952); Forbes v. City of Meridian, 86 Miss. 243, 38 So. 676 (1905).

[129]Butler v. City of Gulfport, 253 Miss. 738, 179 So. 2d 3 (1965).

[130]217 Miss. 860, 65 So. 2d 436, *suggestion of error overruled*, 217 Miss. 876, 65 So. 2d 832 (1953).

[131]*Id.* at 871, 65 So. 2d at 439. *See also* Harris v. City of Newton, 238 Miss. 405, 117 So. 2d 199 (1960) (court should only inquire into the reasonableness of the extension).

[132]Ritchie v. City of Brookhaven, 217 Miss. 876, 65 So. 2d 832 (1953). In Spears v. City of Oxford, 227 Miss. 801, 87 So. 2d 61 (1956), and *In re* Extension of Boundaries of Indianola, 226 Miss. 760, 85 So. 2d 212 (1956), the court quoted the language of the statute, but did not require any showing of public convenience and necessity.

[133]Smith v. City of Meridian, 237 Miss. 486, 497, 115 So. 2d 323, 328 (1959). *See also* Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960).

3. Reasonable Public and Municipal Services Will Be Rendered Within a Reasonable Time

Reasonable services which may be proposed to be provided include *inter alia* police and fire protection, installation of water and sewerage systems, street lighting, maintenance of existing streets, and pest control service.[134] This concept of "reasonable public and municipal services" is quite flexible as evidenced by the court's holding in *Bridges v. City of Biloxi*.[135] In *Bridges* the court found the ordinance to be reasonable although the City of Biloxi promised to furnish certain municipal services only where necessary and feasible.[136]

An understanding of the concept of "within a reasonable time" can only be gleaned from a review of the time spans enumerated in ordinances which have been litigated in the Mississippi Supreme Court. A review of such cases reveals that a period of 5 years constitutes a reasonable time within which to provide municipal service.[137] In *Bridges v. City of Biloxi*,[138] *Dodd v. City of Jackson*,[139] and *Smith v. City of Meridian*,[140] each city proposed to make improvements within a period not to exceed 5 years, and in each case the court adjudicated that the municipality's plan would render municipal services within a reasonable time.

E. The Decree (§ 21-1-33)[141]

The chancellor is governed entirely by statute[142] and may only: (1) ratify and approve the ordinance if he finds that it is reasonable, (2) modify the proposed enlargement by decreasing the territory to be included,[143] or (3) deny the proposed enlargement completely.[144] If the ordinance is accepted in whole or in part, the decree must include a

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[134]*See, e.g.*, Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966); Ritchie v. City of Brookhaven, 217 Miss. 876, 65 So. 2d 832 (1953).

[135]253 Miss. 812, 178 So. 2d 683, *appeal dismissed*, 383 U.S. 574 (1966).

[136]*Id.* at 819, 178 So. 2d at 685.

[137]Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966); Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960); Smith v. City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959).

[138]253 Miss. 812, 178 So. 2d 683, *appeal dismissed*, 383 U.S. 574 (1966).

[139]238 Miss. 372, 118 So. 2d 319 (1960).

[140]237 Miss. 486, 115 So. 2d 323 (1959).

[141]MISS. CODE ANN. § 21-1-33 (1972), *formerly* § 3374-13, MISS. CODE ANN. (1956).

[142]*Id.*

[143]*See, e.g.*, Smith v. City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959) (chancellor must abide by instructions contained in the statute, and may not enlarge the area sought to be annexed).

[144]*See, e.g.*, Ferguson v. Town of Vaiden, 242 So. 2d 124 (Miss. 1970); Lippian v. Ros, 253 Miss. 325, 175 So. 2d 138 (1965).

description of the boundaries of the municipality as altered.[145] And, no matter what form the decree takes, it will become effective after the passage of 10 days from the date thereof.[146]

F. The Appeal (§ 21-1-37)[147]

The municipality or any other interested person who was a party to the proceedings in the chancery court and aggrieved by the chancellor's decree, may, by posting a $500 appeal bond, appeal within 10 days from the date of such decree.[148] This 10-day period begins to run the day following the entry of the decree on the minutes of the court.[149] On appeal the reasonableness of the ordinance is the issue to be decided, not the necessity thereof.[150]

It should be noted, however, that many of the records in annexation cases are very lengthy and that an appeal bond of $500 is hardly sufficient to cover the cost of such records.[151] An increase in the amount of the required bond would certainly be justified.

The right of appeal is not limited to persons who actively participated in the proceedings in the chancery court, since upon statutory notice to all property owners within the area proposed to be annexed, all such property owners become "parties to the proceeding."[152] Therefore, since their property rights are adjudicated and the decree is res judicata to them, they must appeal within the time and manner permitted by statute.[153] But, if the appellants did not participate in the proceedings in the trial court, they may not question the reasonableness of the ordinance for the first time on appeal. Questions not raised in the

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[145]A decree describing the boundaries of the entire city as altered in the ratification and approval of the chancellor is sufficient. Butler v. City of Gulfport, 253 Miss. 738, 179 So. 2d 3 (1965).

[146]The chancery court does not have the power to defer the effective date of the ordinance since such power was not specifically granted in the statute. Lippian v. Ros, 253 Miss. 325, 175 So. 2d 138 (1965).

[147]Miss. Code Ann. § 21-1-37 (1972), *formerly* § 3374-14, Miss. Code Ann. (1956).

[148]Such bond will operate as a supersedeas. *Id. See also* Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960). Such appeal bond does not, however, operate as a supersedeas where, following an unsuccessful appeal to that court, the appellant filed a petition for certiorari in the United States Supreme Court. Bridges v. City of Biloxi, 253 Miss. 824, 180 So. 2d 154 (1965), *appeal dismissed*, 383 U.S. 574 (1966).

[149]Spears v. City of Oxford, 227 Miss. 801, 87 So. 2d 61 (1956).

[150]Town of Crystal Springs v. Moreton, 131 Miss. 77, 95 So. 242 (1923).

[151]*See, e.g.*, Fields v. City of Jackson, 280 So. 2d 837 (Miss. 1973); Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 384 U.S. 574 (1966); Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960).

[152]Sperry Rand Corp. v. City of Jackson, 245 So. 2d 574 (overruling motion to dismiss appeal and denying leave to appear amicus curiae), 248 So. 2d 810 (Miss. 1971).

[153]245 So. 2d 574.

trial court will not be considered on appeal, thus the scope of review will be limited to questions involving the jurisdiction of the chancery court to enter the decree and whether on its face the decree is valid.[154]

The chancellor's finding, if supported by substantial evidence, will not be disturbed on appeal. The supreme court will reverse or remand only if from all the evidence the court concludes that the chancellor was manifestly wrong.[155]

Also, it is important to note that an appeal from an annexation ordinance will not be superseded by proceedings by a commission form of government to test municipal expansion by a referendum on the question.[156]

Failure to appeal a decree ratifying an annexation ordinance precludes a collateral attack by a private party on such ordinance[157] unless the proceedings leading to such decree are wholly void.[158]

G. Post-Decree Recordation (§§ 21-1-39[159] and 21-1-41[160])

Within 10 days after the decree is entered affirming the annexation ordinance, or, when there is an appeal, within 10 days after the supreme court's mandate is received, the chancery clerk must forward to the secretary of state a certified copy of the decree, which will remain a permanent record of the annexation.[161] Also, when the enlargement proceedings have been completed, the municipal authorities must furnish the chancery clerk with a map or plat of the boundaries of the municipality so altered. This map or plat will be recorded in the official plat book of the county.[162]

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[154]248 So. 2d 810, 811.

[155]City of Picayune v. Quick & Grice, Inc., 238 Miss. 429, 117 So. 2d 718 (1960). *See also* Ferguson v. Town of Vaiden, 242 So. 2d 124 (Miss. 1970); *In re* Forest, 247 Miss. 340, 153 So. 2d 688 (1963); Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960). Where the board of aldermen, by passage of the ordinance, has adjudicated that the extension is reasonable, and the chancellor has held that the objectors have failed to show that the extension is unreasonable, the supreme court will not overrule the chancellor without clear grounds of justification. Ball v. City of Louisville, 218 Miss. 867, 56 So. 2d 4 (1952).

[156]Gregory v. City of Amory, 112 Miss. 604, 73 So. 614 (1917).

[157]City of Greenwood v. Humpheys, 157 Miss. 879, 128 So. 885 (1930); Sanders v. City of Starkville, 128 Miss. 742, 91 So. 422 (1922); Adams v. Lamb-Fish Lumber Co., 103 Miss. 491, 60 So. 645 (1912).

[158]City of Pascagoula v. Krebs, 151 Miss. 676, 118 So. 286 (1928). Where only a part of a decree is void, that portion may be collaterally attacked. Lippian v. Ros, 253 Miss. 325, 175 So. 2d 138 (1965).

[159]MISS. CODE ANN. § 21-1-39 (1972), *formerly* § 3374-15, MISS. CODE ANN. (1956).

[160]MISS. CODE ANN. § 21-1-41 (1972), *formerly* § 3374-15, MISS. CODE ANN. (1956).

[161]MISS. CODE ANN. § 21-1-39 (1972), *formerly* § 3374-15, MISS. CODE ANN. (1956).

[162]MISS. CODE ANN. § 21-1-41 (1972), *formerly* § 3374-15, MISS. CODE ANN. (1956).

H. Compliance with the Voting Rights Act

As the final step in effectuating the enlargement of a municipality's boundaries, the requirements of the United States Voting Rights Act of 1965 must be satisfied.[163] The municipality may not hold an election after the annexation of territory until it complies with section 5 of the Act which requires that a political subdivision obtain approval of voting procedures different from those in effect on November 1, 1964. Such approval is effectuated by obtaining a declaratory judgment as to the nondiscriminatory purpose and effect of the change from the United States District Court for the District of Columbia, or by submitting the proposed change to the United States Attorney General.[164] Such approval must be obtained only after the chancery court has determined that the annexation ordinance is reasonable.[165]

III. The Chancery Court Hearing—Evidentiary Aspects

A. Pre-trial Preparation

The attorney who is to present the municipality's case in chancery court should be employed at the commencement of the city council's consideration of the adoption of an ordinance to expand its city limits. This immediate employment is required to enable the attorney to direct the necessary studies and data-gathering procedures to be used by the city council in determining what territory to include in its annexation ordinance. To the extent feasible, data necessary for proper presentment of the municipality's case should be accumulated prior to the passage of the ordinance. Much of the necessary data, however, will require more detailed preparation and, therefore, will not be available until after annexation proceedings have been initiated.

1. Witnesses

The following persons should testify on behalf of the municipality. Prior to the hearing they should be contacted by the attorney and advised of the nature of the testimony expected and of any documents to be presented to them during the course of their testimony.

a. The director of the city planning department, if the city has a planning department, or a city planning consultant who has had extensive experience in municipal planning. The city planner should give testimony indicating the considerations and study given by the depart-

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[163]42 U.S.C. § 1973c (1970). As mentioned previously, see note 63 *supra*, the Voting Rights Act is effective through August 6, 1975.

[164]*Id.*; *e.g.*, Perkins v. Matthews, 400 U.S. 379 (1971).

[165]Sperry Rand Corp. v. City of Jackson, 248 So. 2d 810 (Miss. 1971).

ment for the annexation and the department's recommendation to the city council. If the city does not have a planning department, then a municipal planning consultant should be employed to make a feasibility study or planning analysis of the potential growth areas around the city which the council has under consideration for annexation.

b. The city engineer, or a competent consulting civil engineer. He will work with the attorney in the preparation of the descriptions of the lands to be annexed and of the boundary of the municipality as it will be upon the approval of the annexation ordinance; also the engineer should prepare a map depicting the areas to be annexed under the ordinance and the boundary of the municipality as it will be upon the approval of the annexation ordinance by the courts. The city engineer should also be prepared to show the need for water and sewer facilities in the areas proposed to be annexed and the estimated costs of furnishing such facilities.

c. The director of the city finance department, or a private certified public accountant, who should prepare and offer testimony pertaining to the financial history and present financial condition of the municipality.

d. The director of the county public health department, or a representative of the state public health department, who is in a position to know the health hazards existing in the areas proposed to be annexed.

e. The chief of the police department.

f. The chief of the fire department.

g. The director of the municipal sanitation department.

h. The director of the municipal pest control department.

i. The superintendent of the separate school district.

j. The county superintendent of education of the county in which the municipality is located.

k. The director of the city permit department, or such other person as may be responsible for street lighting, who should make a study of the need for street lighting in the areas proposed to be annexed and the estimated cost thereof to the city.

l. The director of the city traffic department.

m. The director of the parks and recreation department.

n. The municipal librarian.

o. A representative from the Mississippi State Rating Bureau to discuss the effects of annexation upon fire and extended coverage insurance premiums on properties situated in the areas proposed to be annexed.

p. The director of the street maintenance department.

q. The municipal tax assessor, who should develop the assessed valuation of the property situated in the areas proposed to be annexed.

2. Examples of Evidentiary Aids

The following aids should be prepared before trial.

a. Graphs depicting the history of the growth of the municipality, both in population and area, from its inception to the date of the annexation ordinance.

b. A map depicting in colors the land use within the existing corporate limits and the land use within the areas proposed to be annexed.

c. A map depicting the existing streets or roads in the areas proposed to be annexed, and a layout of the major street improvements contemplated for the areas under consideration for annexation.

d. A map showing the engineering plan for the development of water and sewer facilities for the areas proposed to be annexed.

e. A large area photograph depicting the growth of the areas proposed to be annexed.

f. Numerous 8 x 10 glossy-print photographs depicting the residential, commercial, and industrial growth in the areas proposed to be annexed.

g. The annual audits of the municipality since the previous annexation or for a period of 10 years, whichever is shorter.

h. The feasibility study of the areas proposed to be annexed, prepared by the professional planning director or consultant.

i. A brochure containing the major capital improvement plan of the municipality.

B. The Trial of the Case in Chancery Court

As pointed out above, the sole function of the chancery court in the hearing upon the petition by the municipality for the approval of its annexation ordinance is to determine the reasonableness of such ordinance.[166]

The Mississippi Supreme Court established in *Dodd v. City of Jackson*,[167] and reiterated in *Bridges v. City of Biloxi*,[168] certain criteria to be used by the chancery court in making its determination of the reasonableness of an annexation ordinance. Again, these criteria are: (1) the city's need for expansion of its limits; (2) whether the areas proposed to be annexed are reasonably within the path of the growth of the city; (3) the potential health hazards existing in the area proposed to be annexed as the result of inadequate sewerage facilities, waste disposal, etc.; (4) the city's financial ability to make the improvements and furnish the municipal services promised in its ordinance of annexation; (5)

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[166]*See* note 45 and accompanying text *supra*.

[167]238 Miss. 372, 118 So. 2d 319 (1960).

[168]253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966).

the need for proper planning and zoning of the areas to be annexed; and (6) the need for municipal services such as fire protection, police protection, garbage and trash removal, street lighting, libraries, and parks and recreation facilities.[169]

Necessary proof to satisfy the *Dodd* Criteria:

1. Need for Expansion

Following is a grouping of the more important types of evidence which will aid the municipality in showing its expansion needs: testimony of the professional planner using graphs depicting the growth of the city in population; a graph tracing the growth of the city in area through previous annexation ordinances; land-use maps depicting the limited amount of useable area within the corporate limits for further expansion of residential, commercial, and industrial growth; an aerial photograph showing the density of use of lands within the existing corporate limits; field data reflecting the actual number of residential units in the existing city, the number of commercial establishments, the number of public facilities, and the average number of persons per acre living within the existing corporate limits as compared to the national norm; a map depicting the growth and development taking place upon land adjacent to and outside the present city limits; and data pertaining to recently recorded subdivision plats.

The mayor of the city can offer testimony based upon personal observations of the need for expansion of the city limits to provide land for the necessary growth and development of the city and the need for participation in municipal government by persons who have moved to the suburbs.

An expert witness who has done extensive study in political science and municipal government may testify concerning the detrimental effects to the central city of permitting suburban communities to remain outside the corporate limits of the central city or, worse still, permitting such communities to incorporate into separate municipalities.[170]

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[169]Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960).

[170]A good discussion of the evidence necessary to prove a municipality's need for expansion may be found in Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960). In *Dodd* the city of Jackson gave statistical evidence of past population and area growth and expert opinion that the increase in population in the next decade would be the greatest in history. *Id. See also* Bridges v. City of Biloxi,,253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966) (city put on evidence comparing population density between developed area within the city and the area to be annexed); Butler v. City of Gulfport, 253 Miss. 738, 179 So. 2d 3 (1965) (comparison of population and area of the city with that of territory to be annexed); Walker v. City of Moss Point, 252 Miss. 511, 175 So. 2d 173 (1965) (evidence that the city's population had increased in the last 4½ years in an amount equal to that of the increase over the previous 10 years); City of

2. Path of Growth

Proof that the areas proposed to be annexed are reasonably within the municipality's growth pattern can be made through the professional city planner with the use of aerial photographs and land-use maps showing the residential, industrial, and commercial development and other uses to which the land is being put adjacent to and within a reasonable distance of the existing corporate limits of the city.[171]

3. Potential Health Hazards

Evidence of potential health hazards existing in the areas sought to

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Picayune v. Quick & Grice, Inc., 238 Miss. 429, 117 So. 2d 718 (1960) (annexation ordinance held unreasonable because there was no showing of any indication that the population would increase dramatically within the next few years); Smith v. City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959) (evidence of past population growth and estimation of future growth); White v. Town of Drew, 214 Miss. 147, 58 So. 2d 372 (1952) (evidence of population growth).

[171] *See, e.g.*, Dodd v. City of Jackson, 238 Miss. 372, 385, 118 So. 2d 319, 325 (1960). In *Dodd* the city put on evidence showing: that the Pearl River constituted an obstacle to eastward expansion; that only 1,000 residential lots were available within the city; that a need for 16,000 houses during the next 10 years was expected; and the present development in the area proposed to be annexed. *Id. See also* Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966) (city put on evidence showing that only 244 of 3,800 acres within the city were available for development, while in the annexed area there were 2,525 vacant acres and almost all were suitable for residential subdivisions; and evidence that area was in the only available direction of expansion); Walker v. City of Moss Point, 252 Miss. 511, 175 So. 2d 173 (1965) (city put on evidence to show that effective expansion had to be to the south as proposed because expansion was blocked to the north by the Escatawpa River, to the west by the Pascagoula River and its lakes and marshes, and to the east by problems of transportation and services because such expansion would lengthen the city and retain the bottleneck in the center); City of Picayune v. Quick & Grice, Inc., 238 Miss. 429, 117 So. 2d 718 (1960) (annexation unreasonable where nearby developed area is excluded and where proposed annexed area is not within the path of expansion); *In re* the Extension of Boundaries of Philadelphia, 232 Miss. 582, 100 So. 2d 100 (1958) (evidence that there were 317 residences and 42 industrial establishments in the 430 acres allowed to be annexed); Spears v. City of Oxford, 227 Miss. 801, 87 So. 2d 61 (1956) (annexation unreasonable as to 94 of 100 acres proposed to be annexed—only 1 house, land badly eroded and consisted of hills and hollows which could not be converted for residential or other municipal purposes without prohibitive costs, water stood over the area in wet weather, and no city or suburban expansion on or near the property in question); *In re* Extension of Boundaries of Indianola, 226 Miss. 760, 85 So. 2d 212 (1956) (annexation reasonable although the 40 acres annexed contained only 20 residences and 4 business establishments); White v. Town of Drew, 214 Miss. 147, 58 So. 2d 372 (1952) (annexation reasonable where evidence showed that only a few acres within the city were suitable for homebuilding); Nicholson v. Town of Booneville, 208 Miss. 800, 45 So. 2d 594 (1950) (annexation reasonable although there were 165 unimproved acres within the city because there were 255 homes and Northeast Mississippi Junior College with 600 students within the area to be annexed).

be annexed such as inadequate sewerage facilities, lack of waste disposal facilities, and air and water pollution, can be developed through a county health officer, or a member of the state public health department, together with a representative of the Mississippi State Air and Water Pollution Control Commission. It is often possible to obtain photographs of garbage dumped near roads and streets, often in open gullies or ravines; photographs of the effluent from overloaded septic tanks running down the ditches of the roads and streets; photographs of sewerage overflowing from small mechanical treatment facilities in the areas; photographs of air pollution resulting from the emissions from industries operating in the areas; and photographs of aging trash and debris piled along the roads and streets.[172]

4. Zoning and Over-all Planning Needs

Proof of the need for proper land use in zoning and over-all planning in the areas adjacent to the city sought to be annexed can be established through the planning consultant, the city engineer, or the director of the city planning board, using maps of the areas depicting major street improvement plans; plans for the construction and maintenance of adequate sewerage and water facilities to serve the areas; and maps depicting plans for proper land-use zoning for the areas.[173]

5. Need for Municipal Services

Proof of the adjacent territory's need for more adequate fire protection, police protection, garbage and trash disposal, parks and recreation facilities, and other municipal services can be shown through residents of the areas sought to be annexed and by the heads of the various departments of the city who have made inspections and studies of the

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[172]*See, e.g.*, Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960). In *Dodd* the city of Jackson put on evidence of spillage from septic tanks used in the area proposed to be annexed and presence of sewerage in creeks flowing through the area into Jackson, creating health hazards to both areas. *Id. See also* Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966) (evidence revealed use of septic tanks in the area to be annexed and the proof established that the use of such tanks constituted a health hazard to residents of the area and of the municipality); Butler v. City of Gulfport, 253 Miss. 738, 179 So. 2d 3 (1965) (city of Gulfport gave proof of the use of septic tanks and cesspools which overflowed); Walker v. City of Moss Point, 252 Miss. 511, 175 So. 2d 173 (1965); Smith v. City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959) (evidence showed that city sewer system was sufficient for the city and the proposed annexed territory); *In re* the Extension of Boundaries of Philadelphia, 232 Miss. 582, 100 So. 2d 100 (1958).

[173]*See, e.g.*, Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966); Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960).

areas. This proof is directed toward the present lack of adequate municipal services in the areas.[174]

6. Municipality's Financial Capability

Proof of the financial capability of the city to render municipal services in the areas sought to be annexed can be made in the following manner:

a. Testimony of the city tax assessor and an exhibit prepared by him should set forth the assessed valuation of all properties situated in the existing city including the real estate, business and personal property, automobiles, and public utilities as of the current year. The exhibit should also include the projected assessed valuation of all property situated in the areas proposed to be annexed as determined by the tax assessor from the county assessment rolls and the application of the city's formula for arriving at assessed valuations for ad valorem tax purposes. The exhibit should then reflect the total assessed valuation of all properties for ad valorem tax purposes in the existing city and the areas proposed to be annexed and the projected revenue to the city from ad valorem taxes following the annexation of the new territory.

b. Testimony of each of the municipal department heads should set forth a brief history of the growth and development of the department in the 10-year period immediately prior to the trial. This history should include the number of people employed in the department, the kind and character of equipment available to the department for the furnishing of municipal services, the growth in the annual budget, the results of a study of the areas to be annexed, and a projection of the costs of rendering such services in the first year after annexation, including the expected expenditure of funds for equipment, capital improvements, and operating expenses.

c. Testimony of the director of finance for the city or a certified public accountant should employ exhibits from information contained in the official annual audit and other official financial records of the city. These exhibits should include but not be necessarily limited to the following:

(1) SUMMARY OF DEBT SERVICE. This exhibit should include the assessed valuation, the debt limit under the law, the legal debt margin, the percentage of legal debt margin to debt limit, and the fund balances in each of the general funds, general issues, and school issues.

(2) ASSESSED VALUATIONS. This exhibit should reflect the assessed valuations of all property for ad valorem tax purposes including the real estate, business and personal property, and public utilities situ-

[174]Cases cited note 173 *supra*.

ated within the existing city each year for the 10-year period immediately preceding the hearing. The exhibit should reflect the assessed valuation in each category and the total assessed valuation for all of the property for each year. This exhibit should also reflect the assessed valuation of all of the property for ad valorem tax purposes situated in the municipal separate school district but outside the existing city limits for the 10-year period preceding the hearing and in the same manner as the assessed valuations for the property within the corporate limits.

(3) AD VALOREM TAX LEVY (MILLS). This exhibit should reflect the ad valorem tax levy in mills for each purpose for which a levy was made in the 10-year period immediately prior to the hearing. This exhibit should reflect also the total city ad valorem tax levy (mills) for each of the 10 years.

(4) AD VALOREM TAX LEVY (MILLS) IN THE MUNICIPAL SEPARATE SCHOOL DISTRICT OUTSIDE THE CITY LIMITS. This exhibit should reflect the ad valorem tax levy in mills for each school purpose for each of the 10 years immediately prior to the hearing. This exhibit should reflect the total ad valorem tax levy in each of the 10 years covered for all school purposes in the municipal separate school district outside the present city limits.

(5) SUMMARY OF REVENUES, EXPENDITURES, AND FUNDS BALANCE (GENERAL FUNDS). This exhibit should reflect the beginning fund balance, the revenues, the expenditures, and the ending fund balance in each of the 10 years immediately prior to the hearing. This exhibit should also reflect the fund balance at the beginning of the 10-year period, the total revenues for the period, the total expenditures, and the ending fund balance (last fiscal year covered).

(6) SALES TAX COLLECTIONS. This exhibit should reflect the sales tax collected by the city in each of the 10 years immediately preceding the hearing and the total sales taxes collected for the entire 10-year period.

(7) GENERAL AND SCHOOL BONDS AND INTEREST RETIREMENT FUNDS. This exhibit should reflect a summary of revenues, expenditures, and fund balances in each of the 10 years immediately prior to the hearing. This information should be compiled separately for the general bond issues and the school bond issues.

(8) GENERAL AND SCHOOL BONDS AND INTEREST RETIREMENT FUNDS (SUMMARY OF REVENUE). This exhibit should reflect the revenues received by the city in each of the 10 years immediately prior to the hearing resulting from tax levy and other local sources covering each of the general issues and the school issues.

(9) STATEMENT OF LEGAL DEBT MARGIN. This exhibit should reflect the legal debt margin and balance applicable to general

bond issues as calculated under the "ten percent rule."[175] This exhibit should also reflect the legal debt margin and balance applicable to general issues under the "fifteen percent rule."[176]

(10) ASSESSED VALUATION AND AMOUNT APPLICABLE TO DEBT SERVICE GENERAL ISSUES. This exhibit should reflect the assessed valuation of all the municipal property subject to ad valorem taxes applying the percentage of market value being used by the city at the time of the hearing. Then the exhibit should reflect what the assessed valuation of the property within the city would be at each level of an increase of 5 percent of the market value until 100 percent of the market value of such property has been determined. This exhibit should reflect the debt limit of the city under the 10-percent rule and under the 15-percent rule.[177] This exhibit should also reflect the bonded indebtedness, general issues applicable to the 10-percent rule, and the balance applicable to general issues under the 10-percent rule under each of the categories of assessed valuations from the existing percentage being used by the city to 100 percent of market value of all properties subject to ad valorem assessment. This exhibit should also reflect the debt limit under the 15-percent rule, and the balance applicable to general issues under the 10-percent rule.

(11) ASSESSED VALUATIONS AND AMOUNT APPLICABLE TO DEBT SERVICE (SCHOOL ISSUES). This exhibit should contain the same data as that shown in the exhibit under (10) above, except as applicable to school issues as distinguished from general issues.

(12) SUMMARY OF BONDED INDEBTEDNESS. This should be computed as of the end of the fiscal year immediately prior to the hearing.

(13) RECAP OF PRINCIPAL AND INTEREST REQUIREMENTS. This should be computed upon bonded indebtedness, general and school issues, as of the fiscal year ending immediately prior to the hearing.

(14) BONDED INDEBTEDNESS FOR PARTICULAR PURPOSES. Exhibits should be prepared showing the bonded indebtedness for each particular purpose, such as municipal athletic stadium bonds, public high school bonds, building improvement bonds, street and drainage improvement bonds, modernization bonds, community center

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[175]MISS. CODE ANN. § 21-33-303 (1972), *formerly* § 3598-02, MISS. CODE ANN. (1956) (municipality may not issue bonds in an amount which, when added to the then outstanding bonded indebtedness, exceeds 10 percent of the assessed value of taxable property within the municipality).

[176]*Id.* (municipality may not contract any indebtedness which, when added to all of the outstanding indebtedness, both bonded and floating, exceeds 15 percent of the assessed value of taxable property within the municipality).

[177]*See* notes 175 & 176 *supra*.

bonds, street improvement bonds, capital improvement bonds, street and drainage bonds, and public improvement bonds.

(15) SCHOOL BOND ISSUES. Exhibits should also be prepared reflecting, for each school bond issue, the amount and requirements for paying both principal and interest.

The foregoing discussion is merely intended to offer suggestions of potential exhibits pertaining to the financial condition and capability of the municipality. Numerous other exhibits may be used depending upon the particular municipality involved.[178]

IV. Additional Considerations

This section includes several selected aspects of annexation law which, while not appropriate for inclusion in the previous sections, merit the reader's brief attention.

A. Tax Liability (§ 21-1-61)[179]

Property included within a municipality's boundaries by annexation becomes liable for municipal ad valorem taxation on the tax lien date next succeeding the effective date of the annexation decree.[180] When a municipality's corporate limits are extended after January 1 of any year, the municipality may, prior to July 1 of that year, assess said property and collect taxes thereon for the entire year.[181] Property annexed after July 1, however, may not be levied upon for that year.[182]

Concerning a municipality's power to exempt property from taxation, the Mississippi Supreme Court, in *Robertson v. Southern Paper*

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[178]A good discussion of the evidence necessary to prove a municipality's financial capability to make improvements and furnish municipal services may be found in Dodd v. City of Jackson, 238 Miss. 372, 392, 118 So. 2d 319, 328 (1960). *See also* Bridges v. City of Biloxi, 253 Miss. 812, 178 So. 2d 683 (1965), *appeal dismissed*, 383 U.S. 574 (1966); Butler v. City of Gulfport, 253 Miss. 738, 179 So. 2d 3 (1965); Walker v. City of Moss Point, 252 Miss. 511, 175 So. 2d 173 (1965); City of Picayune v. Quick & Grice, Inc., 238 Miss. 429, 117 So. 2d 718 (1960) (chancellor has a right to consider the fact that there is a large undeveloped area within the municipality which has no municipal services and whether municipal services are really needed in the area to be annexed); Smith v. City of Meridian, 237 Miss. 486, 115 So. 2d 323 (1959); Nicholson v. Town of Booneville, 208 Miss. 800, 45 So. 2d 594 (1950) (municipality could only issue additional bonds in the amount of $86,000 and the cost of necessary additional facilities would be $143,217 but annexation was still reasonable because in practicality the improvements should be extended gradually and the existing bonds would probably be reduced during a reasonable period so that ultimately the entire new area would be supplied).

[179]Miss. Code Ann. § 21-1-61 (1972), *formerly* § 3374-27, Miss. Code Ann. (1956).

[180]*Id.*

[181]Miss. Code Ann. § 27-35-3 (1972), *formerly* § 9745, Miss. Code Ann. (Supp. 1972).

[182]*See, e.g.*, City of Gulfport v. Todd, 92 Miss. 428, 46 So. 541 (1908) (territory annexed after assessment date may not be taxed for the year of annexation).

Co.,[183] held that a municipality is without authority to make such an exemption, in consideration of the corporation's agreement not to resist the extension of the boundaries of the city so as to include the property of the corporation, where the corporation was already established.[184]

B. Annexation v. Incorporation[185]

Occasionally persons adjacent to a municipality will attempt to incorporate simultaneously with the municipality's attempt to annex the area. In such a situation the side first taking the initial step receives priority in the chancery court.[186] It is not proper to consolidate the two causes for trial; however, consolidation does not necessarily constitute prejudicial error.[187]

If petition is made to incorporate an area within 3 miles of the boundaries of an existing municipality, that existing municipality must be made a party defendant to such petition and served with process in the manner provided by law.[188]

C. Citizen Petitions

1. Petition for Inclusion

Qualified electors residing within unincorporated territory adjacent to any municipality may petition the chancery court of the county in which such municipality is located for inclusion in such municipality.[189]

The petition must:

(1) be signed by at least two-thirds of the qualified electors residing in the territory proposed to be included;

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[183]119 Miss. 113, 80 So. 384 (1919) (corporation already established where the plant for such corporation was being erected at the time of the exemption agreement).

[184]*Id.* at 126, 80 So. at 385.

[185]See Miss. Code Ann. §§ 21-1-13 to -25 (1972), *formerly* §§ 3374-03 to -09, Miss. Code Ann. (1956), which enumerates the statutory requirements for the incorporation of an area.

[186]City of Jackson v. Whiting, 84 Miss. 163, 36 So. 611 (1904) (initial step: for the city—passage of the ordinance; for the incorporators—posting or publication of legal notice of incorporation).

[187]Fields v. City of Jackson, 280 So. 2d 837 (Miss. 1973). Consolidation did not constitute reversible error in this instance since the basic issue of both petitions is reasonableness and public convenience and necessity. *Id.* at 839.

[188]Miss. Code Ann. § 21-1-15 (1972), *formerly* § 3374-04, Miss. Code Ann. (1956). *See also* Boling v. City of Jackson, 258 So. 2d 443 (Miss. 1972). In *Boling* the city of Jackson contended that petitioners had failed to sufficiently set forth services proposed to be rendered. The court, noting that a lesser standard is required for incorporation than for annexation, found that petitioners' statement of services was adequate. *Id.* at 445.

[189]Miss. Code Ann. § 21-1-45 (1972), *formerly* § 3374-19, Miss. Code Ann. (1956).

(2) describe the metes and bounds of the territory proposed to be included;
(3) set forth the reasons why the public convenience and necessity would be served by such territory being included; and
(4) have attached thereto a plat of the municipal boundaries as they will exist if the territory is included.[190]

No petition by qualified electors for the inclusion of any territory may be filed within 2 years from the date of any adverse determination of any annexation proceedings involving the same territory.[191] However, where proceedings were instituted by electors, subsequent proceedings instituted by the municipality under a different statute, for annexation of a portion of the same land, may be instituted within 2 years of the electors' proceeding. In contrast, section 21-1-45 contains no restriction on the right of the municipal authorities to proceed under the statute as often as they think the proposed enlargement is reasonable and required by public necessity and convenience.[192]

2. Petition for Exclusion

A cross-petition of residents of a city seeking to be excluded from the municipality is not germane to or proper in a hearing on the petition of the city to confirm an expansion of its boundaries. Electors' action for exclusion under section 21-1-45 must be in a separate proceeding from one instituted by a municipality for enlargement of its boundaries.[193]

D. Subsequent Annexation Ordinances

Although section 21-1-27 of the Mississippi Code does not prohibit a municipality from proceeding with the adoption of an annexation ordinance as often as the governing body of the municipality deems such action to be in the public interest,[194] a subsequent annexation ordinance should be avoided if possible until the previous ordinance has been finalized and put into effect. The problem here is that the code requires the municipality to define the boundary of the city as it will be upon the final approval of an annexation ordinance.[195] If an annexation ordinance is filed while a previous annexation ordinance is still pending the

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[190]*Id.*

[191]*Id.*

[192]*In re* Extension of Boundaries of Indianola, 226 Miss. 760, 85 So. 2d 212 (1956).

[193]Ferguson v. Town of Vaiden, 242 So. 2d 124 (Miss. 1970).

[194]*In re* Extension of Boundaries of Indianola, 226 Miss. 760, 85 So. 2d 212 (1956).

[195]MISS. CODE ANN. § 21-1-27 (1972), *formerly* § 3374-10, MISS. CODE ANN. (1956). This problem was commented upon in Fields v. City of Jackson, 280 So. 2d 837 (Miss. 1973).

court's approval, it will be difficult to accurately describe the municipality's boundary as it will appear upon approval of the latter ordinance.

Conclusion

It is suggested that any attorney directing a municipality's proceedings to annex adjacent territory, to ensure that such annexation proceedings will not be defeated because of a mere technical frailty in the procedure employed by such municipality, should adhere carefully, in a step-by-step fashion as delineated in this article, to the statutory requirements governing municipal annexation procedure in Mississippi. In determining the actual meaning or significance of the requirements set forth in the various statutes, the attorney should follow the statutory construction enunciated by the supreme court in its decisions in the numerous cases that have been litigated in the area of municipal expansion.

Also, if the attorney for the municipality follows the trial preparation and procedural techniques discussed in this article, he should have little difficulty convincing the chancellor of the reasonableness of the municipality's desired expansion. The expert witnesses and evidentiary aids suggested in this article constitute a reliable measuring stick for determining the probability of a favorable finding by the chancellor. The likelihood that the chancellor will deem the extension to be reasonable increases with the number of expert witnesses and exhibits revealing favorable information concerning the municipality's need for expansion, its path of growth, potential health hazards to the municipality or the area proposed to be annexed, zoning and overall planning needs, the need for municipal services in the area proposed to be annexed, and the municipality's financial capability to render such services in the area.

Thus, if the requirements discussed earlier are satisfied and if the oral and demonstrative evidence alluded to are obtained, the municipality should have little difficulty overcoming objections raised by residents of the area proposed to be annexed and convincing the chancellor of the reasonableness of such an enlargement.

Finally, a few words concerning the adequacy of present Mississippi annexation statutes seem appropriate. These statutes ensure that the rights and interests of the persons in the area proposed to be annexed will be weighed fairly against a municipality's alleged need to include such territory within its boundaries. As mentioned in the introduction, a municipality must be permitted a reasonable, relatively expeditious procedure for annexing needed adjacent territory to ensure the continued viability of the municipality as a governmental unit and the continued capability of such municipality to satisfy the needs of those persons

residing or owning property within its boundaries. While providing just such a workable procedure for annexation, our statutes also, and just as importantly, provide an opportunity for objectors to present their case in an orderly manner and to have the validity of their grievances determined in an impartial forum. By demanding that the chancellor carefully weigh the factors enumerated in *Dodd v. City of Jackson*[196] in determining whether an annexation ordinance satisfies the statutory requirement of reasonableness, it is assured that an annexation ordinance will not be defeated by the protests of inhabitants of the adjacent territory where such protests are based merely on their desire to avoid the burdens normally accompanying municipal inhabitance, while, at the same time, residing near enough to the municipality to avail themselves of its services, facilities, and employment opportunities.

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[196]238 Miss. 372, 118 So. 2d 319 (1960). *See* notes 167 through 175 and accompanying text *supra*.

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COMMENTS

MILLER V. CALIFORNIA: A MANDATE FOR NEW OBSCENITY LEGISLATION

Introduction

Attempts to regulate obscene matter have resulted in controversy of a magnitude unequaled in any other arena of law. Elaborate tests have been promulgated to define obscenity. These tests have been pregnant with vague criteria requiring constant judicial clarification, and resulting in a plethora of obscenity cases before the Supreme Court. The tests have additionally suffered the shortcoming of being incapable of definitive judicial and lay interpretation, thus increasing the burden on the highest Court. Therefore, while this paper attempts to demonstrate the factual reality that obscenity is incapable of definition, it acknowledges the legal reality that the Supreme Court has chosen to give obscenity a definition. In a recent decision, *Miller v. California*,[1] the power to apply this definition has been largely relegated to the various states. This comment will focus on the impact of this new decision and the resulting need for contemporary obscenity legislation in Mississippi. A clear understanding of *Miller* and its progeny requires an understanding of the necessity for the *Miller* decision, and that understanding can be obtained only through a knowledge of the history of obscenity decisions in the United States.

I. Substantive Development of the Law

The English case of *Regina v. Hicklin*,[2] in 1868, offered the first judicial standards for obscenity. The court held that a publication was obscene if any part[3] of the writing offended the most susceptible reader,[4] regardless of the author's intent.[5] This stern test was adopted in the United States in 1879,[6] and thereafter received wide acceptance.[7]

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[1]413 U.S. 15 (1973).

[2]L.R. 3 Q.B. 360 (1868).

[3]The Court held the entire publication before it to be obscene even though only isolated passages of the work were found to be objectionable. *See* 7 Duke L.J. 116, 117 (1958).

[4][T]he test of obscenity is . . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

L.R. 3 Q.B. 360, 371 (1868).

[5]The Court concluded that even if the defendant's motives were honest and laudable, he still had no right to violate the law. *Id.* at 371-72.

[6]United States v. Bennett, 24 F. Cas. 1093 (No. 14,571) (C.C.S.D. N.Y. 1879).

[7]*See* Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38

With the turn of the century, however, dissatisfaction with the *Hicklin* standard became apparent. Judge Learned Hand reluctantly applied the test, remarking:

> . . . I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time . . . . I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses.[8]

As jurisdictions began to reject *Hicklin*, a judicial search for a replacement test was begun. Most prominent in supplying a solution was the Second Circuit Court of Appeals, which in 1934 rendered the famous *Ulysses* case.[9] Abandoning *Hicklin*, the court held that the test of obscenity should be a publication's "dominant effect"[10] rather than its effect on the most susceptible, and additionally, that the work should be considered as a whole rather than by its isolated passages.[11]

While the *Ulysses* decision was widely accepted throughout the nation,[12] the *Hicklin* rule remained in use[13] until renounced by the Supreme Court 23 years later in the 1957 case of *Butler v. Michigan*.[14] The Court invalidated a Michigan obscenity statute[15] based on the *Hicklin* rule, on the ground that it prohibited the sale of a book to adults solely because it was unsuitable for minors.[16] Although the Court decried the

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MINN. L. REV. 295, 326 (1954).

[8]United States v. Kennerley, 209 F. 119, 120-21 (S.D.N.Y. 1913).

[9]United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934).

[10]*Id.* at 708.

[11]*Id.* at 707. *See* Lockhart & McClure, *Literature*, *supra* note 7, at 327-28.

[12]*See* Lockhart & McClure, *Literature*, *supra* note 7, at 328, *citing* Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945); Parmelee v. United States, 113 F.2d 729 (D.C. Cir. 1940); United States v. Levine, 83 F.2d 156 (2d Cir. 1936); New Am. Library of World Lit. v. Allen, 114 F. Supp. 823 (N.D. Ohio 1953); Bantam Books v. Melko, 25 N.J. Super. 292, 96 A.2d 47 (1953); State v. Lerner, 51 Ohio L. Abs. 321, 81 N.E.2d 282 (C.P. 1948); and others.

[13]*See* Lockhart & McClure, *Literature*, *supra* note 7, at 328-29, *citing* Burstein v. United States, 178 F.2d 665 (9th Cir. 1949); United States v. Two Obscene Books, 99 F. Supp. 760 (N.D. Cal. 1951), *aff'd sub nom.* Besig v. United States, 208 F.2d 142 (9th Cir. 1953); Hadley v. State, 205 Ark. 1027, 172 S.W.2d 237 (1943); King v. Commonwealth, 313 Ky. 741, 233 S.W.2d 522 (1950); Commonwealth v. Donaducy, 167 Pa. Super. 611, 76 A.2d 440 (1950); Commonwealth v. New, 142 Pa. Super. 358, 16 A.2d 437 (1940).

[14]352 U.S. 380 (1957).

[15]MICH. STAT. ANN. § 750.343 (Supp. 1956).

[16]Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 16 (1960).

use of the *Hicklin* criteria for determining obscenity, it did little to offer any new, viable constitutional standards. This situation was remedied several months later in *Roth v. United States*.[17]

The Court in *Roth* outlined a test which controlled the law of obscenity for the next 15 years. Writing for the majority, Justice Brennan declared obscenity to be outside the protection of the 1st and 14th amendments,[18] but concluded that ideas having any redeeming social importance were constitutionally protected.[19] To determine whether a publication had "redeeming social importance," the following test was advanced: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[20] Thus, sex and obscenity were distinguished, sex being obscene only when dealt with "in a manner appealing to prurient interest."[21]

With the rendering of *Butler* and *Roth*, the Court indicated a change of attitude respecting its role in determining obscenity. The idea that the Court was to serve as a censor,[22] more interested in protecting the public than in protecting the rights of the public, clearly began to lose its appeal with the members of the Court. In balancing these conflicting roles, the Court found an acceptable direction in which to lean. Now the Court protected the public from the censor as well as from the smut dealer. Although the *Roth* criteria gave direction to the obscenity question, it did so while creating many definitional difficulties.[23] The Court was to spend a large part of the following decade attempting to clarify and refine the *Roth* standard.

The first such elaboration was made in 1964, in *Jacobellis v. Ohio*.[24]

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[17]354 U.S. 476 (1957).

[18]*Id.* at 481. That obscenity is not protected by the Constitution was earlier determined by the Court in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court placed obscenity and profanity in the category of "fighting words." *Id.* at 572. Justice Brennan relied extensively on *Chaplinsky* in the *Roth* decision. See Roth v. United State, 354 U.S. 476, 485 (1957); 19 Ohio St. L.J. 137 (1958).

[19]354 U.S. at 484.

[20]*Id.* at 489.

[21]*Id.* at 487. See *id.* at 489, defining prurient material as that "having a tendency to excite lustful thoughts."

[22]The function of the censor is to protect the public. But from what dangers? *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 S. Ct. Rev. 1, 3-4, wherein the author lists four possible evils at which he feels obscenity regulations may be directed: "(1) the incitement to antisocial sexual conduct; (2) psychological excitement resulting from sexual imagery; (3) the arousing of feelings of disgust and revulsion; and (4) the advocacy of improper sexual values."

[23]For a detailed analysis of the *Roth* criteria and the resulting difficulties, see Lockhart & McClure, *Censorship of Obscenity*, *supra* note 16, at 49.

[24]378 U.S. 184 (1964). The case involved the possession and exhibition of a film alleged to be obscene.

The decision had importance for two reasons: First, it demonstrated the extreme difficulty—even among the Justices—of applying the *Roth* test to publications alleged obscene;[25] and secondly, it attempted to define the "community standards" criterion used in *Roth*. Again speaking for the Court, Justice Brennan announced that community standards referred to national standards rather than those of the individual states or local communities.[26] However, because only two Justices participated in the majority opinion, several jurisdictions have held *Jacobellis* not dispositive of the issue, and have gone on to adopt statewide community standards.[27]

In 1966, the *Roth* test was further refined in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*.[28] The Court restated the test, adding:

> Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[29]

The Court focused its attention on the meaning of the phrase "utterly without redeeming social value." The Massachusetts Supreme Judicial Court had acknowledged that Cleland's novel possessed minimal literary value, but had concluded that it was not of any social importance. The Massachusetts court stated: "We do not interpret the 'social importance' test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene."[30] Finding error with this determina-

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[25]Justice Brennan wrote the plurality opinion expressing his and Justice Goldberg's view that the *Jacobellis* film was not obscene under the *Roth* test. Justices Black and Douglas concurred on the ground that obscenity is protected by the Constitution (as in their dissent in *Roth*). Justice White concurred without opinion. Perhaps most indicative of the difficulty of applying *Roth* was Justice Stewart's concurring opinion, wherein he allowed constitutional protection to all matter other than "hard core pornography." Admitting that the term might be incapable of intelligent definition, Justice Stewart merely concluded, ". . . I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197.

[26]378 U.S. at 192-95. For an excellent, in depth, discussion of community standards, see Lockhart & McClure, *Censorship of Obscenity*, *supra* note 16, at 108-14; Wolf, *Obscenity: The Lingering Uncertainty*, 2 N.Y.U. REV. L. & SOC. CHANGE 1, 11-12 (1972).

[27]*See* 12 WASHBURN L.J. 185, 188 (1973), *citing* Davidson v. State, 251 So. 2d 841 (Fla. 1972); Alexander v. Commonwealth, 212 Va. 554, 186 S.E.2d 43 (1972).

[28]383 U.S. 413 (1966).

[29]*Id.* at 418.

[30]Massachusetts v. A Book Named "John Cleland's Memoirs of a Woman of Plea-

tion, the Supreme Court attempted to elucidate its criteria for social importance by holding that:

> A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.[31]

In *Memoirs* the Court also suggested that methods of production, sale, and publicity are relevant in determining a work's worthiness of constitutional protection.[32] This was a direct reference to *Ginzburg v. United States*,[33] an obscenity case heard on the same day as *Memoirs*. The defendants in *Ginzburg* ventured to sell three publications by advertising their sexual candor and imagery.[34] Additionally, they sought mailing privileges from towns with the suggestive names of "Intercourse" and "Blue Ball," Pennsylvania, and "Middlesex," New Jersey.[35] Stating that the "leer of the sensualist"[36] permeated the advertising techniques, the Court held that a determination of obscenity in close cases could be made by taking the purveyor's advertising at its word![37] Thus, in such close cases, that advertised as obscene was considered obscene.

Applying the *Roth-Memoirs* test required that a publication appeal to the prurient interest of the "average man." However, publications which depict flagellation, fetishism and lesbianism could be argued to arouse only the disgust of the average man rather than his prurient interest. In 1966, the Supreme Court reacted to such an argument in *Mishkin v. New York*,[38] by expanding the *Roth-Memoirs* test:

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sure," 349 Mass. 69, 73, 206 N.E.2d 403, 406 (1965).

[31]383 U.S. at 419-20 (emphasis by the Court and footnotes omitted).

[32]*Id.* at 420.

[33]383 U.S. 463 (1966).

[34]*Id.* at 468-69.

[35]*Id.* at 467-68.

[36]*Id.* at 468.

[37]"[I]n close cases evidence of *pandering* may be probative with respect to the nature of the material in question . . . ." (emphasis added). *Id.* at 474. Pandering apparently occurs, "[w]here an exploitation of interest in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters . . . ." *Id.* at 475-76.

[38]383 U.S. 502 (1966).

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.[39]

Each of these post-*Roth* cases concerned the proscription of obscenity in the public-commercial arena. *Stanley v. Georgia*,[40] decided in 1969, involved the private use of obscene materials. During a legal search of a home for bookmaking activity, a film was found, confiscated, and later determined to be obscene. The owner was charged with and convicted of possessing obscene matter. Writing for the majority, Justice Marshall reversed the conviction. Acknowledging that obscenity was not constitutionally protected, he upheld the appellant's right to private possession of obscene matter based on the constitutional right "to receive information and ideas, regardless of their social worth,"[41] and "to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[42]

The *Stanley* decision had the effect of creating a split between those jurisdictions which construed it as a relaxation of *Roth-Memoirs* and those which construed it narrowly to obscenity in the home.[43] This quandary was soon resolved in 1971 in the Supreme Court's decisions in *United States v. Reidel*[44] and *United States v. Thirty-Seven Photographs*.[45] In *Reidel* the lower federal court[46] had determined that a consensual sale of obscene matter to an adult was constitutionally protected.[47] The same district court, in *Thirty-Seven Photographs*, had upheld an individual's right to enter the country with obscene matter in his possession.[48] Overruling both cases, the Supreme Court reiterated

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[39]*Id.* at 508. Perhaps noting that the *Mishkin* standard was highly reminiscent of the old *Hicklin* rule, the Court concluded:

> We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most susceptible person facet of the Hicklin test.

Id. at 509.

[40]394 U.S. 557 (1969).

[41]*Id.* at 564.

[42]*Id.*

[43]*See* Wolf, *supra* note 26, citing jurisdictions which accepted both views.

[44]402 U.S. 351 (1971).

[45]402 U.S. 363 (1971).

[46]The United States District Court for the Central District of California.

[47]*See* United States v. Reidel, 402 U.S. 351, 353 (1971).

[48]*See* United States v. Thirty-Seven Photographs, 402 U.S. 363, 366-67 (1971).

that obscenity is not within the scope of constitutional protection, and that *Stanley* did nothing to invalidate the *Roth* criteria.[49]

In 1967 the Court heard *Redrup v. New York*, *Gent v. Arkansas*, and *Austin v. Kentucky*.[50] A single per curiam decision was delivered in which the Court concluded merely that none of the materials involved in the cases were obscene.[51] In addition, the opinion reiterated each participating Justice's constitutional view on obscenity, concluding that the matter before the Court would not be considered obscene under any of their views.[52] *Redrup* soon became a working tool for the Court. In the two terms of court following the decision, no fewer than 21 per curiam decisions were rendered overturning obscenity convictions, in most simply by citing *Redrup*.[53]

The confusion which resulted from the numerous detailed and cryptic tests for obscenity was reflected in the following comment by Justice Harlan:

> The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutonal adjudication. . . .[54]
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> . . . .
>
> The upshot of all this divergence in viewpoint is that any one who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment.[55]

The confusion created by the obscenity tests, combined with the controversial nature of the subject of obscenity, led to an increase in the number of obscenity cases appearing each year on the Supreme Court docket.[56] As the amount of time expended by the Court on obscenity matters increased,[57] the need for a contemporary solution to the obscenity problem became more and more apparent.

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[49]*Id.* at 376; United States v. Reidel, 402 U.S. 351, 354 (1971).

[50]386 U.S. 767 (1967).

[51]*Id.* at 770.

[52]*Id.* at 770-71. Justices Black and Douglas held that all materials (whether obscene or not) were protected by the Constitution. Justices Warren, Brennan, and Fortas found the materials not obscene under the *Roth-Memoirs* test. Justice White similarly found the materials not obscene by applying a variation of the *Roth-Memoirs* test (viewing the "social value" criteria of *Roth-Memoirs* as an independent element of the test). Rogge, *"[T]he High Court of Obscenity" I*, 41 U. Colo. L. Rev. 1, 44 (1969).

[53]Rogge, *supra* note 52, at 44. See Appendix II of that work for case names.

[54]Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704-05 (1968) (concurring opinion).

[55]*Id.* at 707 (concurring opinion).

[56]*See* Rogge, *The Obscenity Terms of the Court*, 17 Vill. L. Rev. 393, 403 (1972). There were 61 obscenity cases listed on the 1971-72 Supreme Court docket. *Id.* at 393.

[57]*See* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 707 (1968), wherein

II. Procedural Developments

Paralleling the metamorphosis of substantive obscenity law were equally significant changes in procedure. The common use of blacklists, police bureaus, and censorship boards[58] during the *Hicklin* years for suppressing what was allegedly obscene was sharply curtailed by a series of Supreme Court cases. The 1964 decision of *Freedman v. Maryland*[59] was foremost in diminishing these activities. In *Freedman*, the Court held that matter could be determined obscene only in a final judicial adversary proceeding.[60] The Court also required that any restraint of matter prior to such a determination "be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."[61] The Court further insisted that the censor bear the burden of proving that matter before it was not constitutionally protected.[62] Thus, censorship boards became sterile agencies since judicial substantiation of their adverse findings was required.

Prior to *Freedman*, the Court ruled on the proper method of seizing allegedly obscene material. In the 1961 decision of *Marcus v. Search Warrant*[63] the Court held invalid a seizure based on a warrant issued solely on a police officer's assessment that certain named items were obscene. The holding, based on the fourth amendment, required that all search warrants aimed at obscene matter be specifically worded, and further stressed the necessity of a prior judicial determination.[64] The Court did not decide whether the determination should be ex parte or adversary. However, the matter was resolved in 1964 in *Quantity of Books v. Kansas*[65] where, in a plurality opinion, the Court held that an adversary proceeding would tend to reduce "the danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books."[66] Although a vast majority of the lower courts have

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Justice Harlan states: "From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court . . . ."

[58]*See* Lockhart & McClure, *Literature*, *supra* note 7, at 302-20, for a detailed report of censorship methods employed.

[59]380 U.S. 51 (1964).

[60]*Id.* at 59.

[61]*Id. See* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) (holding a period of 9 days to be acceptable); Teitel Film Corp. v. Cusack, 390 U.S. 139, 141 (1968) (holding a period of 50-75 days to violate the required prompt determination).

[62]380 U.S. at 58.

[63]367 U.S. 717 (1961).

[64]*See* Note, *The Prior Adversary Hearing: Solution to Procedural Due Process Problems in Obscenity Seizures?*, 46 N.Y.U.L. Rev. 80, 84 (1971).

[65]378 U.S. 205 (1964).

[66]*Id.* at 213. See Note, *supra* note 64, at 93, wherein the author compares *Quantity of Books* and *Marcus*:

followed *Books* and have required preseizure adversary hearings, a minority of jurisdictions have taken the opposite position. A Louisiana federal court held that the need for a preseizure adversary hearing varied with the purpose of the seizure, and limited *Books* narrowly to its facts;[67] *i.e.*, a mass seizure of a large quantity of a number of different books. Therefore, the seizure of a single film for evidentiary purposes, following an ex parte hearing, was held constitutionally sound.[68] A similar result occurred in a 1969 decision in the Federal District Court of Southern Mississippi where preseizure adversary proceedings were not required for film seizures.[69] That court, in *Hosey v. Jackson*,[70] allowed a film seizure without any prior judicial determination of the film's obscenity, on the grounds that the seizure was incident to a lawful arrest.[71]

This overview of procedural developments mirrors the Court's inability to deal conclusively with the substantive issues of obscenity law. Again, the ambiguities, lack of consensus, and equivocal approach haunted the Court with the appearance of each of the myriad of obscenity cases which was to follow.

III. The Impact of Miller and its Progeny

A. Substantive Issues

On June 21, 1973, the Supreme Court delivered a series of opinions which significantly reshaped the area of obscenity law.[72] Most promi-

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> [T]he fourth amendment attack [under *Marcus*] stresses protection of the one in possession of the seized material, whether it be his property right or his right to privacy, while the first amendment-procedural due process concept [as argued in *Quantity of Books*] emphasizes the protection of the rights of the material's ultimate audience.

Note that in both of these decisions the Court placed strong emphasis on protection of the rights of society and did not appear to be influenced by its role as "protector of Society." The Court constantly struggled with these contrasting positions when applying the substantive law.

[67]*See* Note, 37 Albany L. Rev. 203, 212 (1972), *citing* Bazzell v. Gibbens, 306 F. Supp. 1057 (E.D. La. 1969).

[68]Bazzell v. Gibbens, 306 F. Supp. 1057, 1059 (E.D. La. 1969).

[69]*See* Note, *supra* note 67, at 212 *citing* Star-Satellite, Inc. v. Rosetti, 317 F. Supp. 1399 (S.D. Miss. 1970); Hosey v. City of Jackson, 309 F. Supp. 527 (S.D. Miss. 1970), *vacated on other grounds*, 401 U.S. 987 (1971); McGrew v. City of Jackson, 307 F. Supp. 754 (S.D. Miss. 1969), *vacated on other grounds*, 401 U.S. 987 (1971).

[70]309 F. Supp. 527 (S.D. Miss. 1970), *vacated on other grounds*, 401 U.S. 987 (1971).

[71]*Id.* at 533. *See* Note, *supra* note 67, at 212-13 (1972) (citing other jurisdictions which allow seizure of obscene materials as incidents of lawful arrests).

[72]United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973); Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973). Three additional opinions were delivered on June 25, 1973; Alexander v. Virginia, 413 U.S. 836 (1973);

nent among the decisions was *Miller v. California*,[73] wherein Chief Justice Burger announced the demise of *Roth-Memoirs*,[74] the formulation of a new obscenity test,[75] and the relinquishment to the states of power to control obscenity.[76]

Announcing that no single member of the Court, including its author, accepted the *Roth-Memoirs* decision,[77] the Chief Justice blasted its unworkability. He decried the *Memoirs'* suggestion that matter be considered obscene only if affirmatively established to be utterly without redeeming social value.[78] Expressly omitting this criterion, he offered the following test as a basic guideline for triers of fact:

> (a) whether the "average person," applying contemporary "community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[79]

Any matter falling within this criteria, concluded the Court, is obscene,[80] and the obscene is without constitutional protection.[81]

Again the Court was forced to reexamine and redefine its role as guardian of the public. The Court assumed a greater role as protector of the public by omitting the criterion that matter be utterly without redeeming social value. Simultaneously, the Court reduced its protec-

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Roaden v. Kentucky, 413 U.S. 496 (1973); Heller v. New York, 413 U.S. 483 (1973).

[73]413 U.S. 15 (1973).

[74]*Id.* at 20-23.

[75]*Id.* at 24.

[76]*Id.* at 30-34.

[77]*Id.* at 23. In his dissenting opinion, Justice Douglas maintained, as he did in *Roth*, that obscenity is constitutionally protected. *Id.* at 44-45. Justice Brennan, joined by Justices Stewart and Marshall, discussed his reasons for abandoning *Roth* in Paris Adult Theater I v. Slaton, 413 U.S. 49, 73 (1973) (dissenting opinion). The incapability of defining obscenity, he determined, results in vague guidelines which prevent fair notice to an individual of a possible wrong, *id.* at 86; restricts free dissemination of ideas, *id.* at 88; and creates institutional stress within the courts, *id.* at 91. Therefore, in the absence of distribution to minors and nonconsenting adults, Justice Brennan would invoke the Constitution to prohibit governmental suppression of sexually oriented material. *Id.* at 113.

[78]413 U.S. at 21-22. The Chief Justice acknowledged that proving matter to be utterly without redeeming social value is "a burden virtually impossible to discharge under our criminal standards of proof." *Id.* at 22.

[79]*Id.* at 24.

[80]As with *Roth*, it appears that each of the three criteria is to be weighed separately and that each is to be met before matter can be held obscene.

[81]*Id.* at 23. It should also be noted that *Miller* is directed only at "hard core pornography." *Id.* at 27.

tion of the public's rights with the more stringent requirement that a work merely lack "serious literary, artistic, political or scientific value."

Perhaps the most significant aspect of the *Miller* decision was the Court's relinquishment to the various states of the power to control obscenity.

> Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene. . . .
>
> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City . . . . People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolution of imposed uniformity.[82]

The Court directed, therefore, that the "community standards" referred to in part (a) of the *Miller* test should be those of the State of California.[83] The rationale behind the Court's decision took into account the inability of a jury to understand and apply a "national standard."[84] If this rationale is valid, it stands to reason that a jury in any city would suffer from the same inability to understand and apply a state standard. Accordingly, even within individual communities, understanding and application of a community standard would vary.

The Court in *Miller* further invited the individual states to enact legislation to accomodate the second criterion of the *Miller* test, requiring only that such legislation specifically define the patently offensive sexual conduct it prohibits.[85] The Court gave the following examples of acts which a state may choose to define:

> (a) Patently offensive representations or descriptions of ultimate

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[82]*Id.* at 31-33.

[83]*Id.* at 33-34. The term "community standards" obviously no longer refers to a national standard. It appears that it refers solely to the standards of the individual states, as was held in the post-*Miller* case of State v. J-R Distributors, Inc., 512 P.2d 1049, 1065 (Wash. 1973). However, a reasonable extension of the *Miller* Court's logic would find the term equally applicable to the "local" community, as was held in Jenkins v. Georgia, 199 S.E.2d 183 (Ga. 1973) *prob. juris. noted*, 94 S.Ct. 719 (1973).

See Lockhart & McClure, *Censorship of Obscenity*, *supra* note 16, at 112-13, wherein the authors express the fear that application of state or local community standards would "emasculate independent judicial review based on federal constitutional standards governing obscenity censorship, Balkanize art and literature in the United States, and reduce art and literature to the levels of the most Philistine communities in the country . . . ." The question of whether state or local community standards should be used is currently before the Supreme Court in *Jenkins v. Georgia*. *See also* note 26 *supra*.

[84]413 U.S. at 30.

[85]*See id.* at 24-25.

sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[86]

Additionally, the Court cited the statutes of Oregon and Hawaii as examples of "laws directed at depiction of defined physical conduct, as opposed to expression."[87] The Court would then rely heavily on the jury system[88] to determine whether an accused's actions fall within the category defined as obscene by applicable state law.

In placing this reliance on the jury system to determine obscenity under the *Miller* guidelines, the Court explained in a footnote that the mere fact that juries may reach differing conclusions regarding the same materials does not abridge constitutional rights, since this possibility exists under any criminal statute.[89] It should be noted, however, that the possibility of juries disagreeing when applying a law to a set of facts depends largely on the clarity of the wording of that law and the ease of its interpretation. Asking jurors to interpret such terms as "patently offensive" and "prurient interest" as applied to "community standards" is an invitation to dissimilarity of results. Thus, the distinct possibility exists that many jurisdictions in a state may find a certain publication to be obscene, while an equal number afford it constitutional protection after applying the same "statewide community standards." One may argue that obscenity decisions would then appropriately reflect differences in statewide community standards and that this was the Supreme Court's goal in *Miller*. Beyond this goal, however, exists the rather ludicrous potential for dissimilarity of results between juries in the same jurisdiction. Where the obscenity of a publication is a close question, final adjudication becomes largely a toss of the coin.

Post-*Miller* cases have been primarily concerned with determining whether "community standards" refers to state or local standards,[90] and whether *Miller* is to be applied retroactively.[91] The most common question before the lower courts, however, is whether *Miller* invalidates obscenity statutes which fail to specifically define offensive sexual acts.

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[86] *Id.* at 25.

[87] *Id.* at 24 n.6, *citing* HAWAII PENAL CODE §§ 1210-16 (1972); ORE. REV. STAT. § 167.060 (1971).

[88] 413 U.S. at 26.

[89] *Id.* at 26 n.9.

[90] *See* note 83 *supra*.

[91] *See* Jenkins v. Georgia, 199 S.E.2d 183 (Ga. 1973) *prob. juris. noted*, 94 S. Ct. 719 (1973), applying *Miller* retroactively. Rhodes v. State, 283 So. 2d 351 (Fla. 1973), however, would apply *Miller* only prospectively. The Fifth Circuit Court of Appeals applies perhaps the most imaginative test, giving an accused charged prior to *Miller* the benefit of both tests. United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973). This matter is currently before the Supreme Court in *Jenkins v. Georgia*.

Miller expressly directs that offensive conduct "be specifically defined by applicable state law, as written or authoritatively construed."[92] It would appear that this requires the enactment of a specific statute which, once in existence, may be interpreted as written or as authoritatively construed. In essence, a specifically defining statute is a condition precedent to an authoritative construction. However, only a minority of the jurisdictions have so interpreted *Miller*.[93] The vast majority have upheld generally worded statutes composed of little more than the now antiquated *Roth-Memoirs* criteria.[94] Typical of this view is *Redlich v. Capri Cinema*,[95] wherein the court stated:

> [T]he Supreme Court in *Miller*, extended to the state courts [the invitation] that they fill in any statutory interstices or rectify any deficiencies, by their own authoritative judicial constructions. That is why the Supreme Court remanded any number of cases . . . to the various state courts, that the state courts could have the opportunity to construe their own existing statutes so as to determine whether, as so construed, they complied with the standards of *Miller* . . . .[96]

In so holding, the majority of these decisions seems to ignore one of the basic purposes of *Miller*, as well as a common-sense precept of the written law. Man should be able to read the law so that he may act in a way not to violate the law.[97]

Mississippi statutes on obscenity epitomize the inadequacies of generally worded statutes. Those statutes controlling obscene "films"[98] and "photographs"[99] merely proclaim the illegality of dealing with such obscene matter without attempting to define obscenity or to establish criteria for determining the obscene. Other Mississippi statutes which control obscene "publications"[100] offer but a brief restatement of the *Roth* criteria. There is a clear need for the enactment of contemporary legislation designed to comply with the constitutional requirements of

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[92]413 U.S. at 24.

[93]*See* Stroud v. State, 300 N.E.2d 100 (Ind. 1973); *cf.* Detco, Inc. v. McCann, 365 F. Supp. 176 (E.D. Wisc. 1973).

[94]*See* People v. Enskat, 109 Cal. Rptr. 433 (Ct. App. 1973); Rhodes v. State, 283 So. 2d 351 (Fla. 1973); State *ex rel.* Wampler v. Bird, 499 S.W.2d 780 (Mo. 1973); Redlich v. Capri Cinema, Inc., 14 Cr. L. 2194 (N.Y. Sup. Ct. 1973); Grigsby v. State, 14 Cr. L. 2134 (Tenn. Crim. App. 1973); State v. J-R Distributors, Inc., 512 P.2d 1049 (Wash. 1973).

[95]14 Cr. L. 2194 (N.Y. Sup. Ct. 1973).

[96]*Id.*

[97]This matter may soon be resolved for it is currently scheduled to be heard before the Supreme Court in Jenkins v. Georgia, 199 S.E.2d 183 (Ga. 1973) *prob. juris. noted*, 94 S. Ct. 719 (1973).

[98]Miss. Code Ann. § 97-29-33 (1972).

[99]*Id.* § 97-29-37.

[100]*Id.* §§ 97-29-39, 99-31-3.

Miller. Such legislation should include the three-part *Miller* test for determining obscenity, and should be directed collectively at films, photographs, and publications, for the sake of simplicity. In addition, contemporary obscenity statutes should include a definitional collection of acts considered to be obscene, as do the Court-suggested laws of Hawaii and Oregon.[101] The Oregon statute[102] specifically defines nudity, sadomasochistic abuse, sexual conduct, sexual excitement, obscenities and obscene performances.[103] By incorporating these definitions into a revised Mississippi statute, the State will better inform the potential violator of his impending illegal acts, while meeting the constitutional requirements of *Miller*.

B. Procedural Issues

The procedural question concerning the necessity of an adversary hearing prior to the seizure of allegedly obscene material came before the Court in *Heller v. New York*[104] and *Roaden v. Kentucky*.[105] These opinions were delivered 4 days after *Miller*.

Heller involved the viewing of a film by a judge who subsequently issued a warrant authorizing seizure of the film based on his ex parte determination that it was obscene.[106] Noting that there is no absolute constitutional right to a prior adversary hearing in such cases,[107] the Court found no need for an adversary hearing: (1) where a film is seized only for evidentiary purposes;[108] (2) where a judicial officer authorizes the seizure after fully reviewing the allegedly obscene matter;[109] and (3) where there is no showing that seizure will prevent continued exhibition of the film (if continued exhibition would be inhibited, the Court would allow the authorities to make a copy of the film).[110] If such an ex parte seizure is made, the Court would require that a prompt, final judicial determination be made available in a full adversary hearing.[111] In addi-

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[101]*See* note 87 *supra*.

[102]ORE. REV. STAT. § 167.060 (1971).

[103]It should be noted that the Oregon statute, suggested by the Supreme Court as a model because of its specificity of definition, is directed toward minors. MISS. CODE ANN. § 97-5-13 (1972) is similarly designed to control the sale or exhibition of obscene materials to minors, and includes specific definitions of many of the terms defined in the Oregon statute.

[104]413 U.S. 483 (1973).

[105]413 U.S. 496 (1973).

[106]*See* 413 U.S. at 485.

[107]*Id.* at 488.

[108]*See id.* at 490.

[109]*Id.* at 492.

[110]*Id.* at 492-93.

[111]*Id.* at 493. *See* note 61 *supra*. It would appear from the present case that a period of 48 days would not satisfy the Court's requirement of a prompt determination.

tion, the Court saw no inconsistency between its holding and that in *Quantity of Books v. Kansas*, the latter being merely limited to its facts.[112] The Court concluded that "[a]ny system of prior restraints of expression comes to [the] Court bearing a heavy presumption against its constitutional validity."[113]

In *Roaden*, a police officer observed the showing of a film, concluded it was obscene, arrested the manager of the theater, and seized the film as incident to the arrest.[114] The Court disallowed the procedure, stating:

> Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is . . . unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness.[115]

This "higher hurdle" prevents the seizure of any matter alleged to be obscene in the absence of judicial determination on the matter. Therefore, the 1970 holding by the Federal District Court of the Southern District of Mississippi in *Hosey v. Jackson*[116] that seizure of a film may be allowed as an incident to lawful arrest, is clearly erroneous under *Roaden* and *Heller*.

Mississippi statutory law controlling obscene publications[117] delineates precise procedural rules for determining obscenity.[118] Once the proper authorities[119] have reasonable cause to suspect that certain matter is obscene, an action may be instituted in chancery court praying for an adjudication of obscenity.[120] The court will then make a prompt ex parte determination whether there is probable cause that the matter is ob-

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[112]413 U.S. at 491. The *Quantity of Books* decision involved a mass seizure of a large quantity of a number of different books. *See* notes 65 through 68 and accompanying text *supra*.

[113]*Id.*

[114]Roaden v. Kentucky, 413 U.S. 496, 497 (1973).

[115]*Id.* at 504.

[116]309 F. Supp. 527 (S.D. Miss. 1970), *vacated on other grounds*, 401 U.S. 987 (1971). *See* text accompanying note 69 *supra*.

[117]Miss. Code Ann. §§ 97-29-39, 99-31-1 to -27 (1972).

[118]*Id.* §§ 99-31-5 to -15. It should be noted that these statutes refer only to obscene publications. The Mississippi statutes refering to obscene films, *id.* § 97-29-33, and obscene photographs, *id.* § 97-29-37, contain no procedural guidelines. This shortcoming should be remedied with future legislation.

[119]The Attorney General of the State of Mississippi, a district attorney or a county prosecuting attorney may bring an action for an adjudication of obscenity.

[120]Miss. Code Ann. § 99-31-5 (1972).

scene.[121] Should probable cause be determined, a complaint will be endorsed to that effect and respondents will be summoned[122] to appear before the court[123] for a prompt adversary determination of the matter's obscenity.[124] After a determination by the court or jury[125] that the matter is obscene, a final judgment to that effect will be entered which may be enforced by use of a permanent injunction or by a court direction requiring disposal of all matter adjudged to be obscene.[126] Each of these procedures is sound under *Miller*, *Heller*, and *Roaden*. However, an additional Mississippi statute allows the issuance of a temporary restraining order against allegedly obscene matter after judicial probable cause[127] of its obscenity has been established.[128] This statute appears to be inconsistent with *Heller*, since it would prevent continued exhibition or sale of a publication prior to an adversary determination of its obscenity. It is suggested, therefore, that authorization of a temporary restraining order or preliminary injunction based solely on the probability of a material's obscenity be deleted from any future obscenity legislation.

Perhaps the most immediate danger which may result from the enactment of vaguely worded obscenity legislation is the acute possibility that an offender may be incarcerated as a criminal for doing acts which to his own judgment are not in violation of any existing law. Justice Douglas, dissenting in *Miller*,[129] acknowledged this problem. Commenting on the *Miller* substantive criteria, he observed:

> [H]ow under these vague tests can we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?[130]
>
> . . . .
>
> To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a nation dedicated to fair trials and due process.[131]

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[121]*Id.* § 99-31-9.

[122]*Id.*

[123]*Id.* § 99-31-11.

[124]*Id.* § 99-31-13.

[125]Upon his request, a defendant is entitled to an advisory jury. With the consent of all parties, the court *may* order a trial by jury whose verdict shall have the same effect as in cases of law. *Id.* Considering the *Miller* Court's emphasis upon use of the jury to determine obscenity, it is suggested that the chancery courts employ the use of juries in all cases. Revised Mississippi legislation could assure this procedure. See note 88 and accompanying text *supra*.

[126]MISS. CODE ANN. § 99-31-15 (1972).

[127]Judicial probable cause is to be contrasted with that probable cause which would allow an officer to act without prior judicial approval in certain areas of criminal law.

[128]MISS. CODE ANN. § 99-31-17 (1972).

[129]Miller v. California, 413 U.S. 15, 37 (1973).

[130]*Id.* at 39-40.

[131]*Id.* at 43-44.

Justice Douglas then offered a procedural remedy for the substantive evil of overbreadth:

> If a specific book, play, paper or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific.[132]

In 1962 the State of Mississippi adopted a procedural remedy similar to that recommended by Justice Douglas. By statute, a criminal prosecution for dealing in obscene publications can occur only after a publication is adjudged obscene in an adversary proceeding, or after it is established in an ex parte chancery proceeding that probable cause exists that the publication is obscene.[133] It must further be shown that the alleged offender had knowledge of such adjudication or endorsement.[134]

This Mississippi procedure is worthy of great praise because of the protection it offers to those selling, exhibiting, and distributing publications. In light of the difficulty of interpreting present obscenity statutes and the recent responsibilities placed on the individual states to control obscenity, each state would be wise to enact comparable legislation. It should be noted, however, that the Mississippi civil proceeding applies only to allegedly obscene publications. Those statutes controlling obscene films[135] and photographs[136] offer no comparable procedures. This flaw should be corrected in future Mississippi legislation. It is also suggested that the present Mississippi statute controlling civil proceedings[137] be amended to allow criminal prosecution only of those who deal in matter knowing that it has been adjudged obscene in an adversary proceeding. The present method, which allows criminal prosecution of those dealing in matter endorsed by a chancellor as "probably obscene," could have the effect of preventing the sale of matter which is later adjudged not obscene. In such cases, the fear of criminal prosecution restrains the sale or exhibition of matter before it is finally determined to be obscene, and thus violates the spirit of *Heller* if nothing more.

Conclusion

The growing number of obscenity cases arising before the Supreme Court was largely a result of vague criteria offered by the Court to define

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[132] *Id.* at 42.
[133] Miss. Code Ann. § 99-31-19 (1972).
[134] *Id.*
[135] *Id.* § 97-29-33.
[136] *Id.* § 97-29-37.
[137] *Id.* § 99-31-19.

obscenity and the inability of the Justices to agree on how the criteria should be interpreted. The current test for obscenity outlined in *Miller v. California*[138] is no less ambiguous than its antecedents. It is now, however, the responsibility of the various states to determine obscenity using the present formula. The question remains open whether the states will face the same myriad problems which congested the Supreme Court. Much depends upon the Court's final determination on questions left unanswered in *Miller*; *i.e.*, should state or local community standards be used in determining obscenity; and, should the states be required to enact specifically worded obscenity legislation, or will generally worded statutes suffice, as authoritatively construed. These questions are currently before the Court.[139]

Regardless of how these questions are answered, it is clear that the Court has invited the states to enact obscenity legislation to comply with *Miller*. In light of the controversial nature of obscenity and its stormy history, the states should meet this challenge by adopting exact legislation. This legislation should include a restatement of the *Miller* criteria for determining obscenity and should specifically define obscene acts which it hopes to prohibit. In addition, it is suggested that a civil proceeding be adopted by each state to serve as an additional protection against vaguely worded obscenity legislation. The present Mississippi law outlining a civil proceeding is commendable, but should be amended to expand its protection.

As a result of *Miller*, the highest court of each state now finds itself in what was the Supreme Court's contradictory position of serving as the protector of society and guardian of the rights of society. The *Miller* criteria place greater emphasis on the court's function as protector of society than did *Roth* and *Memoirs*. Consequently, the rights of society to sell and obtain information receive less emphasis than in the past. Procedural devices such as civil proceedings to determine obscenity may serve as a safeguard of society's right to sell, publish and distribute information. Unfortunately, no such procedural device has been designed to safeguard the public's right to receive information. This task is solely the function of the courts. Accomplishing this task requires that the courts of each state act with a mature understanding of contemporary attitudes. The Supreme Court has directed, in *Miller*, that constitutional protection be afforded to all matter other than "hard core pornography." While this term is not defined by the Court, it serves as a clear message that local repression of matter having serious literary, artistic, political, or scientific value will not be tolerated. Therefore, the

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[138]413 U.S. 15 (1973).

[139]Jenkins v. Georgia, 199 S.E.2d 183 (Ga. 1973) *prob. juris. noted*, 94 S. Ct. 719 (1973).

long sought right of the state courts to determine obscenity locally may be but an ephemeral privilege if this new-found power is abused.

Jesse Samuel Owens, Jr.

PLANNING IDEAS FOR THE SMALLER ESTATE

Estate planning is a conscious and systematic ordering of one's property undertaken to maximize the amount preserved for the intended beneficiaries and to minimize the estate tax liability that will occur at death.[1] In almost all cases professional advice will be required for an effective estate plan recognizing a client's individual objectives and legal realities. The need for estate planning is not confined to large estates; a smaller estate may suffer from a proportionately greater tax burden because of a lack of estate planning than a large one. Because of this, the general practitioner may be called upon to provide estate planning services for his clients who expect him to exercise as much expertise as an attorney specializing in estate and tax planning.

When planning a client's estate the general practitioner will be able to select from a number of estate planning devices, including outright gifts,[2] life insurance,[3] inter-vivos trusts[4] and testamentary trusts.[5]

Two of the best estate planning devices for individuals of moderate wealth are the Uniform Gift to Minors Act and the short-term trust. Proper use of the Uniform Gifts to Minors Act will result in income and estate tax savings without the expense that would accompany an irrevocable transfer in trust. The short-term trust, on the other hand, is ideal for the donor who wishes to realize income tax savings but who will need the income producing property for his own use later. This comment will analyze the legal consequences of the Uniform Gifts to Minors Act and of short-term trusts, outlining their benefits to individuals of moderate wealth who wish to realize income and estate tax savings.

I. The Mississippi Uniform Gifts to Minors Act

A. The Statutory Provisions

The Uniform Gifts to Minors Act was written to provide a simple,

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[1]*See generally* A. Casner, Estate Planning (3rd ed. 1961); J. Trachtman, Estate Planning (1968).

[2]*See generally* W. Bowe, Tax Savings Through Estate Planning (1963); A. Casner, *supra* note 1; G. Craven, The Gift Tax (rev. ed. 1966).

[3]*See generally* W. Bowe, *supra* note 2; A. Casner, *supra* note 1; G. Craven, *supra* note 2; J. Trachtman, *supra* note 1; Kamens, *Using Life Insurance for Estate Planning*, 107 Trusts and Estates 983 (1968); Yohlin, *Ownership and Transfer of Life Insurance*, N.Y.U. 28th Inst. on Fed. Tax. 765 (1970).

[4]*See generally* Berall, *Inter-Vivos Trusts are Still Excellent Estate Planning Tools, Despite Recent Changes*, 36 J. Tax. 258 (1972); Corbin, *Living Trusts in Action*, 106 Trusts and Estates 625 (1967); Lauritzen, *Irrevocable Trusts and the Estate Tax—Some Tax Traps and Suggestions*, 13 Tax Counselor's Q. 135 (1969); Winkelman, *Living Trusts*, 108 Trusts and Estates 346 (1969).

[5]*See generally* J. Trachtman, *supra* note 1; Lauritzen, *supra* note 4; Yohlin, *Tax-Saving Techniques in Testamentary Trusts—Revisited*, 11 Prac. Law. 51 (1965).

inexpensive method for making gifts to minors.[6] First drafted as the Uniform Gift to Minors Act of 1956 and revised in 1965, the Act has been adopted by 48 states and the District of Columbia.[7] The Mississippi Uniform Gifts to Minors Act was enacted in 1958[8] and later amended to cover gifts other than cash and securities.[9]

The Act specifies the procedures for, and consequences of, making gifts to minors. It provides that an adult may make a gift of a security,[10] life insurance policy,[11] annuity contract,[12] or money[13] to a minor[14] by transfering the property to a custodian.[15] Once a gift is made in the manner specified by the Act it is irrevocable[16] and gives the minor an indefeasibly vested legal title to the property.[17]

The designated custodian controls the property using specified powers.[18] He must manage the custodial property[19] and pay over to the minor, or expend for his benefit, so much or all of the custodial property as the custodian deems advisable for the support, maintenance, education, and benefit of the minor.[20] To the extent that the custodial property is not expended for the minor it will be paid to him when he attains the age of 21.[21] In fulfilling his duties a custodian may retain any of the

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[6]Before the Uniform Gifts to Minors Act, gifts of property to minors posed various legal difficulties, including the questions of the donor's tax liability, the rights of the minor in the case of a direct gift, and the rights and duties of the minor and guardian as to the property transferred. *See* 1965 UNIFORM GIFTS TO MINORS ACT, Commissioners Prefatory Notes, 9B UNIFORM LAWS ANNOTATED 222.

[7]Only Georgia, Louisiana, and Puerto Rico have failed to adopt the Uniform Gifts to Minors Act. Of the jurisdictions adopting the Act, 29 have amended it in various ways while 20 have laws substantially similar to the Uniform Act. AM. JUR. 2d Desk Book, Doc. No. 129 (Supp. 1973).

[8]Law of April 29, 1958, ch. 248 [1958] Miss. Laws 419.

[9]MISS. CODE ANN. § 91-19-1 to -19 (1972).

[10]The security may be registered or unregistered. *Id.* § 91-19-7(a)(1)-(2).

[11]*Id.* § 91-19-7(a)(4).

[12]*Id.*

[13]*Id.* § 91-19-7(a)(3).

[14]The gift may be made to only one minor. *Id.* § 91-19-7(b).

[15]There may only be one custodian. *Id.*

[16]*Id.* § 91-9-9. While the donor must promptly put the gift in the possession and control of the custodian, his failure to do so will not affect the consummation of the gift. The gift is also valid even if the proposed custodian is ineligible or declines to serve. *Id.* § 91-19-7(c).

[17]*Id.* § 91-19-9(a).

[18]*Id.* § 91-19-11.

[19]*Id.* § 91-19-11(a).

[20]*Id.* § 91-19-11(b). The chancery court may, on the petition of a parent or guardian of a minor who has attained the age of 14, order the custodian to pay to the minor or expend for his benefit as much of the custodial property as is necessary for the minor's support, maintenance, or education. *Id.* § 91-19-11(c).

[21]*Id.* § 91-19-11(d). If the minor dies before attaining the age of 21, the custodian must

property originally given. Reinvestments, however, may be made only in property that would be purchased by a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital.[22] The custodian must maintain proper records of all transactions involving the minor's property and must keep the custodial property separate from his own.[23]

The custodian may be an adult member of the minor's family, a guardian of the minor, a trust company, or the donor.[24] The custodian is entitled to reimbursement from the custodial property for all expenses incurred in the exercise of his duties.[25] Any custodian other than a donor may receive compensation for his services as well.[26] An uncompensated custodian is liable only for losses resulting from his bad faith, gross negligence, intentional wrong doing, or failure to follow the required standards of prudence when making investments.[27] The Act also exempts issuers, transfer agents, banks, brokers, life insurers, and certain other third parties from liability when acting on the instructions of a donor or custodian.[28] If the original custodian resigns, dies, or is removed, a successor custodian may be appointed.[29] Successor custodians are limited to adult members of the minor's family, a guardian of the minor, or a trust company.[30] If the original custodian resigns he may designate his successor. If he fails to do so and if the minor has reached the age of 14, the minor may designate a successor custodian.[31] If the

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pay or deliver the balance of the custodial property to the estate of the minor. *Id.*

[22]*Id.* § 91-19-11(e).

[23]*Id.* § 91-19-11(g) to -(h). The Act specifies the form in which securities must be registered and bank accounts maintained. *Id.* § 91-19-11(g).

[24]*Id.* § 91-19-7.

[25]*Id.* § 91-19-13(a).

[26]*Id.* § 91-19-13(c). If the custodian is compensated from the custodial property, the standard of compensation for his services is determined by one of the following standards in the order stated:

(1) Directions of the donor at the time the gift is made;
(2) A statute of the state applicable to custodians;
(3) A statute of the state applicable to guardians; or
(4) An order of the court.

Id.

[27]*Id.* § 91-19-13(e). The compensated custodian who maintains the standards of prudence provided in the Act for making investments of the custodial property is not liable for any resulting losses to the custodial property. *See* text accompanying note 22 *supra*.

[28]Third parties are not required to determine whether the custodian has been duly designated. A third party bears no responsibility for the proper application of property delivered to the custodian. MISS. CODE ANN. § 91-19-15 (1972).

[29]*Id.* § 91-19-17.

[30]*Id.*

[31]*Id.* § 91-19-17(a). In the event that a custodian dies, resigns or is not eligible, the Act requires that the original custodian or his legal representative deliver the custodial property to the successor custodian or have the item, if it is a security or life insurance

original custodian or a successor custodian dies, resigns, or is not eligible at any time before the minor attains the age of 21 and the minor has a guardian, the guardian of the minor shall be the successor custodian.[32] If the minor has no guardian, the chancery court will, upon petition, appoint a successor custodian.[33] Removal of the original custodian may be requested by a donor, a legal representative of the donor, a guardian of the minor, an adult member of the minor's family, or by the minor if he has attained the age of 14. In this removal proceeding the chancery court may either remove the custodian and designate a successor or require the custodian to give bond for the performance of his duties.[34]

B. Tax Consequences of the Act

Gifts made under the Mississippi Uniform Gifts to Minors Act convey to the minor indefeasibly vested legal title to the property, subject to a power in trust exercisable by the adult custodian.[35] Under certain circumstances use of the Mississippi Uniform Gifts to Minors Act can result in both estate and income tax savings, but improper use of the Act can have disastrous tax consequences.

The Uniform Gifts to Minors Act is designed to meet the annual gift tax exclusion of the Internal Revenue Code,[36] which provides that a gift to a minor will qualify for the exclusion[37] if both the property and its income may be expended by, or for the benefit of, the donee before he attains the age of 21 and will to the extent not so expended pass to the donee when he becomes 21. If the donee dies before reaching 21 the unexpended portion must be payable to his estate or to any person he may appoint under a general power of appointment.[38] The provisions of the Mississippi Uniform Gifts to Minors Act meet the above requirements of the Internal Revenue Code;[39] as a result any gift made under the Act will qualify for the gift tax exclusion.[40] Thus, a donor may give

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policy or annuity contract, properly registered so as to properly identify the new custodian. *See id.* § 91-19-7(b).

[32]*Id.* § 91-19-17(d).

[33]*Id.*

[34]*Id.* § 91-19-17(e).

[35]*Id.* § 91-19-9.

[36]*See* Newman, *The Uniform Gifts to Minors Act in New York and Other Jurisdictions—Tax Consequences, Possible Abuses, and Recommendations*, 49 CORNELL L. REV. 12, 35 (1963).

[37]*See* INT. REV. CODE of 1954, § 2503(b). This section provides the donor with a $3,000 per-donee exclusion from the total value of gifts made during the tax year that are subject to the gift tax.

[38]*Id.* § 2503(c).

[39]*Compare* MISS. CODE ANN. § 91-19-11(b), (d) (1972) *with* INT. REV. CODE of 1954, § 2503(c).

[40]Rev. Rul. 86, 1956-1 CUM. BULL. 449.

as much as $3,000 yearly to a donee and married couples may use the marital deduction provisions[41] of the Code to give as much as $6,000 yearly to each donee without incurring gift tax liability. These amounts are in addition to the $30,000 lifetime gift tax exemption granted to each taxpayer-donor by the Code.[42]

Once a gift under the Mississippi Uniform Gifts to Minors Act is made the income from the gift paid by the custodian to the minor to discharge or satisfy any person's legal obligation to support the minor is includible in the income of that person. To the extent that the income from the gift is used for purposes other than the discharge or satisfaction of a person's legal obligation to support the minor the income is taxable to the minor.[43] To determine the extent of one's legal obligation of support it is necessary to refer to local law.[44] The law in most states, including Mississippi, fails to outline the parents' legal obligation of support while the family unit is intact. As a result, the support provided is generally determined by parental discretion. Courts have considered the obligation of support in divorce and maintenance cases and have determined the extent of the parent's support obligation by reference to the parents' position in life and financial condition.[45] In a decision that follows a well-reasoned minority rule,[46] the Mississippi Supreme Court has held that where a minor child is qualified for a college education it is the primary duty of the father, if financially able, to provide the funds for such education.[47] While this ruling is of great advantage from the point of view of the child who is assured of higher education, it lessens

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[41]INT. REV. CODE of 1954, § 2513.

[42]*Id.* § 2521.

[43]Rev. Rul. 357, 1959-2 CUM. BULL. 212. The same tax consequences occur where the income from a trust is used to satisfy a settlor's legal obligation of support. See Rev. Rul. 357, 1959-2 CUM. BULL. 212, which provides that "the income from [custodial] property, to the extent it is used for the support of the minor-donee, is includible in the gross income of any person who is legally obligated to support the minor donee . . . ." The ruling applies only to the income derived from the property given to a minor under the Mississippi Uniform Gifts to Minors Act. Any use of the property itself by the custodian for the benefit of the minor would not be taxable to the donor. *Id.*

[44]*See* Treas. Reg. § 1.662(a)(4) (1960).

[45]MISS. CODE ANN. § 93-13-1 (1972); Simpson v. Rast, 258 So. 2d 233 (Miss. 1972); Reynolds v. Davidow, 200 Miss. 480, 27 So. 2d 691 (1946); Duncan v. Duncan, 119 Miss. 271, 80 So. 697 (1919). Other jurisdictions follow the same considerations. *See generally* Annot., 1 A.L.R.3d 382 (1965).

[46]*See, e.g.*, Rawley v. Rawley, 94 Cal. App. 2d 562, 210 P.2d 891 (Dist. Ct. App. 1949); Johnson v. Johnson, 346 Mich. 418, 78 N.W.2d 216 (1956); Herbert v. Herbert, 198 Misc. 515, 98 N.Y.S.2d 846 (Dom. Rel. Ct. 1950); Cohen v. Cohen, 193 Misc. 106, 82 N.Y.S.2d 513 (Sup. Ct. 1950); Commonwealth *ex rel.* Rothrock v. Rothrock, 205 Pa. Super. 32, 206 A.2d 397 (1965).

[47]Pass v. Pass, 238 Miss. 449, 118 So. 2d 769 (1960). This case involved a minor in the custody of the mother, where the mother and father were divorced and living apart.

the income tax savings that would otherwise be available to parents under the Act. Thus, in planning an estate care should be taken to ensure that funds paid to the minor by a custodian under the Act will be used only for items that do not discharge or satisfy the legal obligations of any person to support or maintain the minor. Any funds not paid to the minor before he attains the age of 21 will be paid to him when he reaches that age and thus will not be includible in the income of the parent.

Property given to a minor under the Act will be includible in the gross estate of the donor for estate tax purposes if the property is given in contemplation of death or the donor himself is the custodian of the gift and dies while serving in that position. In all other cases the value of the property is includible in the gross estate of the donee.[48]

Gifts made to a minor and managed by a custodian under the provisions of the Act will reduce the income and estate tax liability of the donor. In addition, the management provided by the custodian will prevent the gift property from being subject to possible indiscretions and whims of the minor. Designation of an adult custodian other than the donor, such as the minor's mother,[49] relative, or family friend, eliminates the need for, and possibly prohibitive cost of, an institutional custodian. If the gift is sufficiently large and composed of property that might benefit from institutional management the Act does allow the use of an institutional custodian.[50] The tax and administrative savings that can be realized from the use of the Mississippi Uniform Gifts to Minors Act are of substantial advantage to moderate income individuals who might not benefit from more complex and expensive trust arrangements.

II. Short-Term Trusts

The second device that will allow persons of moderate wealth to realize considerable income tax savings is the short-term trust.[51] A short-term trust requires an irrevocable transfer of property to the trust for a period of not less than 10 years, after which the corpus of the trust reverts to the grantor.[52] The principle advantage of the short-term trust is that income from the trust is transferred to the beneficiaries and taxed at their income tax rates, while the grantor will be able to recover the

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[48]Rev. Rul. 357, 1959-2 Cum. Bull. 212.

[49]*Id.*

[50]Miss. Code Ann. § 91-19-7 (1972).

[51]*See generally* Barnett, *Short-Term Trusts are not Dead!*, 3 Tax Adviser 83 (1972); Bush, *Short-Term Trusts: Advantages and Dangers*, N.Y.U. 24th Inst. on Fed. Tax. 317 (1966); Weinstock, *Short Term Trust: A Worthwhile Tax Saving Tool*, 50 Taxes 153 (1972).

[52]Int. Rev. Code of 1954, § 673.

corpus of the trust upon termination of the trust.[53] Since the income is taxed to the beneficiaries, substantial tax savings can be realized by the grantor who is able to do without the current income. Income from a short-term trust created by a grantor in favor of his minor children, who in most cases would have little other income, would be subject to a much lower federal income tax rate than would the parent's income. In effect, such a transfer to children would result in a lower net family tax on the same amount of income. Furthermore, if the grantor died during the term of the trust only the value of the reversionary interest in the trust property would be includible in his gross estate for estate tax purposes.[54]

Because there is some estate tax liability during the term of the trust and full estate tax liability after the corpus of the trust reverts to the grantor, the short-term trust is of little long-term benefit to those who have accumulated large amounts of property and thus have no need for it's reversionary feature. Such individuals should transfer property to their intended beneficiaries by outright gift or by an irrevocable transfer in trust without reversion.

In creating a short-term trust for the children of the grantor, care must be used to assure compliance with the requirements of sections 673 through 677 of the Internal Revenue Code of 1954.[55] Noncompliance would result in the inclusion of the trust income in the taxable income of the grantor, eliminating the primary benefit of the trust. Careful analysis of the relevant Code sections will enable the attorney to avoid possible "tax traps."[56]

Authorization for short-term trusts is given by Section 673(a) of the Code, which provides that the grantor of a trust will be considered the "owner of any portion of a trust . . . ," and thus subject to taxation on the income of the trust, if he has a reversionary interest in either the corpus or the income, and if reversion will, or may reasonably be expected to, occur within 10 years of the establishment of the trust.[57] As a result, a trust that is designed to terminate at least 10 years and a day from creation, or upon the death of the grantor if his life expectancy is

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[53]*Id.* This section provides that the income from the trust is taxable to the beneficiary so long as any reversionary interest retained by the grantor will not take effect within 10 years after the creation of the trust.

[54]*Id.* § 2037. The possibility of the grantor dying within the term of the trust must be considered and if the family does not have sufficient income-producing assets other than the grantor's annual earnings and the property transferred in trust, inexpensive term life insurance should be purchased on the life of the grantor for the period the trust is in existence.

[55]*Id.* §§ 673-77.

[56]*See* Collins, *How to Avoid Tax Traps Arising From Retention and Excessive Control by Grantor*, 27 J. TAX. 356 (1967).

[57]INT. REV. CODE of 1954, § 673(a).

longer than 10 years, or upon the death of the income beneficiary whatever his life expectancy, will comply with the requirements of section 673.[58]

Since current law makes it advantageous to distribute trust income annually,[59] the trust instrument should so provide. The trust instrument should also provide for an open class of beneficiaries.[60]

Since no discretionary power is involved by these provisions, a short-term trust can be established with the grantor or his spouse as the trustee.[61] Section 674 of the Code allows the grantor to designate himself or his spouse as the trustee, without being considered the "owner of any portion of the trust . . . ," if he limits the trustee's powers[62] to those stated in section 674(b). The grantor may allow broader discretionary powers to third party trustees selected within the limitations of either section 674(c) or (d).[63]

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[58]*Id.* § 673(c). This section provides that a grantor will not be considered to be the owner of a trust because of any reversionary interest that takes effect on the death of the income beneficiary, even if the beneficiary has such a short life expectancy that the reversionary interest may reasonably be expected to take effect within 10 years.

[59]*See* note 76 *infra*.

[60]A provision allowing for an open class of beneficiaries will not affect the gift tax consequences of a transfer in trust. *See* Rev. Rul. 679, 1955-2 CUM. BULL. 390.

[61]If the grantor has a need which requires broad discretionary powers to be vested in the trustee, the grantor will have to select an independent, third party trustee.

[62]It is the mere existence of powers to control the trust, held by the grantor or a third party not adverse to him, and not the exercise of the powers, which gives rise to adverse tax consequences. INT. REV. CODE of 1954, §§ 674-676.

[63]Section 674(a) of the Internal Revenue Code of 1954 sets forth the general rule that the grantor will be treated for tax purposes as the owner of a portion of the trust if he, or a third person not adverse to him, has the power (beyond specified limits set forth in section 674(b)), to dispose of the beneficial enjoyment of the income or corpus of the trust.

Section 674(b) specifies various powers which will not cause the income to be taxed to the grantor regardless of the person in whom they are vested. These powers include: (1) the power to apply trust income to support the grantor's dependents, except to the extent so applied; (2) the power to change the distribution of income, no earlier than 10 years after the creation of the trust; (3) the power to affect the distribution of income by will (except where income is or may be accumulated for testamentary disposition); (4) the power to shift trust income or corpus from one charity to another; (5) the power to invade the corpus, either for the benefit of any designated beneficiary provided the power is limited by a reasonably definite standard set forth in the trust instrument, or for any current income beneficiary provided that the distribution of corpus must be chargeable against the proportionate share of corpus held in trust for the payment of income to the beneficiary; (6) the power to postpone payment of income to a beneficiary temporarily, where the income withheld must finally be paid to such beneficiary or his estate; (7) the power to postpone payment of income to a beneficiary during his minority or disability, where the income is withheld pursuant to a power which is exercisable only during the minority of a current income beneficiary; and (8) the power to apportion receipts and disbursements between corpus and income.

Section 674(d) of the Code permits trustees other than the grantor or his spouse to

Taxation of the trust income to the grantor may also result if certain administrative powers are held by the grantor or any other person not adverse to his interests.[64] These administrative powers include the power to effect title to trust property for less than adequate consideration, the power to borrow from the trust without adequate security or interest, and other general powers of administration.[65] Because of these provisions, property which the grantor may wish to control in his individual capacity during the term of the trust should not be transferred to the trust.

Section 676 of the Code provides that if the grantor or a person not adverse to him has the power to revest in the grantor any part of the corpus of the trust the grantor will be treated as the owner of that part of the trust for tax purposes, unless such power is to take effect no sooner than 10 years after the creation of the trust.[66] Since a short-term trust instrument should provide that the corpus will revert to the grantor at the earliest possible date (whether that be at the end of 10 years and a day or upon the death of the beneficiary) there is no need to provide a power of revestiture in the grantor, whose interest in the corpus is well secured.

Section 677 of the Code states that where income of any portion of a trust is, or in the discretion of the grantor or any person not adverse to him may be, distributed, held, or accumulated for future distribution to or for the benefit of the grantor, the grantor will be treated as the owner, for income tax purposes, of that portion of the trust unless such power becomes effective after 10 years from the date of the establishment of the trust.[67]

Annual distributions of income should be directed by the trust instrument for two reasons. First, this will enable the grantor to take advantage of the yearly $3,000 gift tax exclusion.[68] The grantor's transfer to the trust is considered a taxable gift in the amount of the fair market

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allocate income among, or to accumulate income for, beneficiaries, if such power is solely exercisable by the trustee and is limited by definite external standards set forth in the trust instrument itself.

Section 674(c) of the Code permits trustees who are not "related or subordinate parties who are subservient to the wishes of the grantor," (as defined in section 672(c)) to distribute, apportion, or accumulate income to or for beneficiaries without subjecting the grantor to tax, if the power is solely exerciseable by the independent trustee, even without regard to the above-mentioned standards of section 674(d).

[64]INT. REV. CODE of 1954, § 675.

[65]But if the grantor desires to reserve for himself any or all of these powers, he may do so as a trustee in a fiduciary capacity. *See* 6 MERTEN'S LAW OF FEDERAL INCOME TAXATION § 37.38 (1968). *See also* Gurich v. Commissioner, 295 F.2d 845 (1st Cir, 1961).

[66]INT. REV. CODE of 1954, § 676.

[67]*Id.* § 677.

[68]*Id.* § 2503(b).

value of the property transferred, less the value of the grantor's retained interest in the property.[69] Under Section 2503(b) of the Code,[70] however, the first $3,000 in gifts made to each donee by the donor is not included in the total amount of taxable gifts for the year.[71] The exclusion does not apply where the gift is one of a future interest.[72] Where trust income is ordered accumulated and paid to a beneficiary at the end of the trust period, the gift will be considered a future interest.[73] The same disqualification occurs even where the trustee alone has the discretion to distribute or accumulate such income.[74] When the trust instrument requires that the trust income be distributed annually, however, the income is considered a present gift that qualifies for the gift tax exclusion.[75]

Annual distributions of income are desirable for a second reason. The Tax Reform Act of 1969[76] eliminated the earlier advantages of accumulating trust income and instituted an unlimited throwback rule.[77] This rule recomputes the beneficiary's tax on the accumulated income when it is distributed as if it had been distributed to the beneficiary each year, as earned. The new law allows the beneficiary a credit for taxes already paid by the trustee. The old laws had exceptions applying to a 5-year throwback rule and lending certain advantages to accumulating trust income.[78] Accumulation under the new rule can be detri-

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[69]*See* Rev. Rul. 242, 1958-1 Cum. Bull. 251.

[70]Int. Rev. Code of 1954, § 2503(b).

[71]The donor of a gift in trust is entitled to an exclusion for each beneficiary when he makes a gift in trust unless the gift is of a future interest. Helvering v. Hutchings, 312 U.S. 393 (1941).

[72]Int. Rev. Code of 1954, § 2503(b).

[73]Fondren v. Commissioner, 324 U.S. 18 (1945); Rassas v. Commissioner, 196 F.2d 611 (7th Cir. 1952); United States v. Knell, 149 F.2d 331 (7th Cir. 1945); Glenn v. Pitts, 145 F. Supp. 779 (W.D.S. 1956).

[74]Commissioner v. Gloss, 123 F.2d 548 (7th Cir. 1941); Welch v. Paine, 120 F.2d 141 (1st Cir. 1941).

[75]*See* cases cited note 73 *supra*.

[76]Act of Dec. 30, 1969, Pub. L. No. 91-172, 83 Stat. 487.

[77]Under the old law, if a grantor established a trust and did not retain certain controls over the trust property, he was not taxed on the income from the trust. The trust itself was taxed unless the income was currently accumulated or required to be distributed to the beneficiaries. The tax on all income accumulated by the trust was paid by the trust, which was considered a separate taxpayer with its own exemptions, deductions, and tax rate. If the beneficiaries had other income the trust could have accumulated income at a lower tax rate and the accumulations could later be distributed, tax-free, to the beneficiaries. While the old law had a 5-year throwback rule which was an attempt to eliminate this abuse, it also had several exceptions that could be used and that resulted in tax-free distribution to the beneficiary. Act of Oct. 16, 1962, Pub. L. No. 87-834, 75 Stat. 101. The new throwback rule eliminates the exceptions and is unlimited, with the recomputation of the beneficiary's tax occurring on all of the accumulated income, when it is distributed. Act of Dec. 30, 1969, Pub. L. No. 91-172, 83 Stat. 487.

[78]Since the primary advantage available was the accumulation of income at low tax

mental to the beneficiary, however, since the trust is not entitled to the exemptions and deductions of an individual taxpayer. The income tax paid by a trust might well be higher than that paid by a beneficiary receiving an annual distribution of income from the trust.[79]

The main advantage of a short-term trust, as outlined above, is the shifting of income from the high tax rate of the grantor to the lower tax rate of the beneficiary, who may use the income, paid to him annually, for any purpose. The income from the trust may be taxable to the grantor, however, to the extent that the annual income is used to discharge the grantor's legal obligation of support.[80] Thus, if trust income is used for such a purpose the main benefit of the short-term trust, income tax savings, is lost. Since the extent of one's legal obligation of support is determined by local law,[81] the effect of this potential tax liability will vary among States.[82] It is safe to say, however, that the more practical ways of spending the annual income distribution will result in the income being taxed to the grantor.[83]

So long as the beneficiary spends the annual income distribution of the trust on the items that are not considered legal obligations of support under local law, or so long as he reinvests the funds as he receives them,[84] the annual income distribution will be taxed as part of his income. Some authorities[85] have suggested that such annual income distributions could be accumulated by depositing the yearly income in savings bank accounts or government bonds.[86] After distribution the

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rates with later tax-free distribution of this income, the advantage was only recognized where the beneficiary had other income and a higher tax rate than the trust.

[79]This is true if the beneficiary has only nominal income from other sources.

[80]INT. REV. CODE of 1954, § 677(a). Judicial application of section 677(a) has resulted in the principle that trust income used to satisfy the legal obligations of the grantor is, for tax purposes, considered distributed to him and thus is taxable to him. *See* Helvering v. Stuart, 317 U.S. 154 (1942); Helvering v. Schweitzer, 296 U.S. 551 (1935); Douglas v. Wilcutts, 296 U.S. 1 (1935); Hamiel's Estate v. Commissioner, 253 F.2d 787 (6th Cir. 1958).

[81]Treas. Reg. § 1.662(a)-4 (1960). See notes 44 & 45 *supra*, and accompanying text.

[82]A minority of states, including Mississippi, have held that a college education is a legal obligation of support. *See* cases cited notes 46 & 47 *supra*.

[83]*See* Goodson, *When is Payment in Discharge of Parent's Legal Obligation?*, 99 TRUSTS AND ESTATES 17 (1960); Haber, *Support of Relatives*, 107 TRUSTS AND ESTATES 730 (1968). *See also* Mairs v. Reynolds, 120 F.2d 857 (8th Cir. 1941).

[84]*See* Ehrlich, *The Effective Use of Support Trusts: Trusts for Minors, Custodian Statutes, Gifts of Future Interests*, N.Y.U. 19TH. INST. ON FED. TAX. 729 (1961); Haber, *supra* note 83; Yohlin, *Assignment and Deflection of Income*, N.Y.U. 20TH. INST. ON FED. TAX. 147 (1962).

[85]*See, e.g.*, Ehrlich, *supra* note 84.

[86]Government bonds may be purchased in a minor's name and later cashed in by the minor once he has reached a sufficient age to understand the transaction. Treas. Dept. Cir. N. 750, Revised §§ 321.8, 321.9(g).

money becomes the property of the beneficiary and any decision on his part to use his own funds for any purpose at a later date would not result in tax liability to the grantor.[87] The distributed income in this form is subject to use at the discretion (and indiscretion) of the minor beneficiary. When the time comes to spend any portion of the annual income distribution, it is the minor who must sign the check or withdrawal slip. An older child who is aware of his father's financial situation may be unwilling to spend the trust income in a way that will increase his parents' tax liabilities.[88] Thus, before establishing a short-term trust with annual income distributions for a minor benenficiary, the grantor should carefully consider the maturity of the minor and the degree of cooperation which might be expected from him in the useful expenditure of the annual income distribution.

At the end of the stated term of the short-term trust, the trust corpus will revert to the grantor. Because of this reversion, a short-term trust can be highly beneficial to a grantor with a high income who is unwilling or unable to part with the corpus permanently. An individual with a high income and with high family expenses could benefit from the income tax savings available with the trust during his high income working years and use the corpus as an income supplement during his retirement years.[89]

III. Conclusion

Many individuals can accumulate estates large enough to be subjected to estate taxation but of insufficient size to allow for the establishment of inter-vivos trusts. Such individuals can make use of the Mississippi Uniform Gifts to Minors Act to transfer income-producing property to their children, reducing both income and estate tax liability.[90] Traditional trust expenses can also be reduced by the appointment of the grantor's spouse, a relative, or a friend as the custodian of the gift. Gifts made under the Act can be completed without red tape or large

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[87]George F. Booth, 3 T.C. 605 (1944); Lillian M. Newman, 1 T.C. 921 (1943). *See also* Ehrlich, *supra* note 84, at 748.

[88]There are other disadvantages of direct distribution to the minor. If the minor is very young, such distributions may not be invested unless a guardian is appointed. Guardianship involves legal expenses, bond premiums, and court proceedings, including accountings to the court. If the minor's funds are invested, his death before majority might necessitate the appointment of an administrator, with additional expense.

[89]The only drawback of this use of the short-term trust is the cost of a third party adverse trustee. If the corpus of the trust is relatively small, the minimum trustee fees could be high enough to divert a sizeable portion of the trust income away from the beneficiary.

[90]As noted earlier, the funds spent for the minor should not include expenditures to satisfy any person's legal obligation of support, as defined by local law. *See* note 43 *supra*.

legal fees. Larger gifts of various securities or other property requiring professional management can benefit from the designation of a trust company as custodian of the gift, as permitted by the Act. Since the gift property is transferred to the minor at age 21, the grantor should consider the maturity and ability of the minor before making gifts under the Act.

Individuals who do not wish to make inter-vivos gifts or irrevocable transfers in trust can use the short-term trust to shift taxable income to the lower tax bracket of their children. These grantors will be assured of use of the corpus when the trust terminates and reversion occurs. Due to the reversion feature, the short-term trust is of benefit in estate planning in the sense that the trust income will be paid to the beneficiary and will not be subject to estate taxation at the death of the grantor.

If the grantor can afford to do so, he should use the Mississippi Uniform Gifts to Minors Act to give property to his children. Such use of the Act will aid the grantor in planning his estate and reduce estate taxes, establish an independent estate for his children, and reduce his current income tax liability in a simple and inexpensive manner.

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REVERSE DISCRIMINATION

Marco DeFunis' application for admission to the University of Washington Law School was denied on the basis of an admissions policy which took into account, among other factors, his race.[1] While the university claimed that the undergraduate record and LSAT scores were not the only factors relied upon to give a total picture of an applicant's ability to succeed in law school and the legal profession, the admissions procedure neither included a personal interview nor an inquiry into the degree of economic deprivation in the background of the individual applicant.[2] It was the expressed policy of the law school to obtain a "reasonable representation" of certain minority groups, of which Mr. DeFunis was not a member.[3] In order to achieve this goal, less emphasis was placed upon the undergraduate records and LSAT scores of minority applicants.[4] Some minority applicants who were invited for admission had grades and LSAT scores so low that had they been of the white race, their applications would have been summarily denied.[5] Since no more than 150 students were to be accepted, the admission of minority applicants under a separate standard was found by the trial court to result in a denial of admission to applicants of racial groups other than those granted a preference. Consequently, the trial court held that the University of Washington had discriminated against Mr. DeFunis because of his race in violation of the equal protection clause of the 14th amendment.[6] This decision was reversed by the Supreme Court of Washington, which held that since the purpose of the racial classification was not invidious, and since it was related to a compelling state interest, it was not prohibited by the 14th amendment.[7]

I. Equal Protection

While the right to legislate implies the right to classify,[8] the equal

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[1]The factors taken into account in the admissions policy were an applicant's undergraduate record, the academic standards of his undergraduate college, his scores on the LSAT, the quality of his work in seminar and writing sessions, employment and extracurricular activities, as well as his race. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1174 (1973). The United States Supreme Court has granted certiorari in the *DeFunis* case. 94 Sup. Ct. 538 (1973).

[2]*Id.*

[3]Marco DeFunis is a Sephardic Jew. Rabinove, *Law School Minorities: What Price Admission?*, 128 America 387 (1973). The admissions policy granted a preference to Black Americans, Chicano Americans, American Indians, and Phillipine Americans. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1175 (1973).

[4]DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1175 (1973).

[5]*Id.*, 507 P.2d at 1176.

[6]*Id.*, 507 P.2d at 1177.

[7]*Id.*, 507 P.2d at 1178.

[8]Martin v. City of Struthers, 319 U.S. 141, 154 (1943) (Frankfurter, J., dissenting).

protection clause limits this right to the extent that the classification must be reasonably related to a permissible state purpose.[9] There is a general presumption of validity of the purpose, and the relation of the classification to that purpose is generally allowed on the basis of a practical test, rather than one requiring an abstract degree of perfection.[10]

Classifications drawn according to race, however, are suspect classifications which are "odious to a free people."[11] If they are ever to be upheld, "they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the purpose of the Fourteenth Amendment to eliminate."[12]

Where racial classifications have been employed to prohibit racial intermarriage, they have been held to serve no legitimate state purpose.[13] Similarly, the designation of the race of political candidates on election ballots has been held to be related to no purpose independent of racial discrimination.[14] In *Oyama v. California*,[15] it was held that interference with the ability to earn a living on the basis of race was unconstitutional. In *Buchanan v. Warley*,[16] denial of the right to purchase property on the basis of race was disallowed.

Other classifications based on race which have been struck down by the Supreme Court are: (1) those having the effect of denying an education;[17] (2) those causing segregation of the races in educational institutions (as invidious discrimination);[18] and (3) those causing segregation in transportation[19] and public parks.[20]

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[9]Rinaldi v. Yaeger, 384 U.S. 305, 309 (1966); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 681 (1966) (Harlan, J., dissenting).

[10]McGowan v. Maryland, 366 U.S. 420, 425 (1961); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949); Skinner v. Oklahoma, 316 U.S. 535, 540 (1942).

[11]Loving v. Virginia, 388 U.S. 1, 11 (1967); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[12]Loving v. Virginia, 388 U.S. 1, 11 (1967). In McLaughlin v. Florida, 379 U.S. 184, 192 (1964), it was stated that the central purpose of the 14th amendment was to eliminate racial discrimination from official sources in the states.

[13]Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

[14]Anderson v. Martin, 375 U.S. 399 (1964).

[15]332 U.S. 633 (1948). *See also* Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[16]245 U.S. 60 (1917).

[17]Sweatt v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). *See also* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Fisher v. Hurst, 333 U.S. 147 (1948); Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[18]Brown v. Board of Educ., 347 U.S. 483 (1954); Boling v. Sharpe, 347 U.S. 497 (1954).

[19]Gayle v. Browder, 352 U.S. 903 (1956).

[20]Watson v. Memphis, 373 U.S. 526 (1963). *See also* Baltimore v. Dawson, 350 U.S. 877 (1955). It has also been held that the fact that desegregation would result in violence was an insufficient reason to continue segregation. Cooper v. Aaron, 358 U.S. 1, 16 (1958).

A. Overriding Purpose Independent of Racial Discrimination

That the state can have a purpose independent of prohibited racial discrimination, which was suggested in *Loving v. Virginia,*[21] is a proposition rooted in *Korematsu v. United States.*[22] In *Korematsu,* the apparent danger of espionage and sabotage by enemy agents in the context of an impending foreign invasion of the West Coast was held to be a sufficiently independent purpose apart from racial discrimination to justify the temporary detention of persons of Japanese ancestry. The majority of the Court stressed that "pressing public necessity" could justify racial classifications, but that "racial antagonism" never could.[23] Due to the unique circumstances of this case, as well as the intimate connection of the detention order with the war powers, it is difficult to determine the degree of pressing public necessity that would constitute an overriding purpose independent of racial discrimination in other contexts.[24]

It has been suggested that where the purpose of a racial classification is to benefit a disadvantaged minority which has been the object of previous injustice, the consequential dangers to the majority, which in other situations have demanded a heavy burden of justification, are not present.[25] Where there is a benevolent purpose toward the minority group, the element of invidiousness that has characterized previous racial discriminations is said to be lacking.[26] The essence of this position is that since the purpose of the 14th amendment is to protect minority groups against legislation hostile to them because of their race, then it follows that where the purpose of the classification based on race is to benefit such groups, the requirement of a purpose independent of the racial discrimination prohibited by that amendment is satisfied.[27]

That the 14th amendment was intended to eliminate only that racial discrimination considered to be invidious is indicated by the *Slaughter House Cases,*[28] where it was stated that the purpose of the

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[21]388 U.S. 1, 11 (1967). *See also* McLaughlin v. Florida, 379 U.S. 184 (1964).

[22]323 U.S. 214 (1944). *See also* Hirabayashi v. United States, 320 U.S. 81 (1943).

[23]323 U.S. at 216.

[24]Korematsu v. United States, 323 U.S. 214 (1944) (Frankfurter, J., concurring) (judging the action solely in the context of war), (Roberts, Murphy, Jackson, J.J., dissenting) (strongly objecting to the use of racial classifications); *Recent Developments in the Law: Equal Protection,* 82 HARV. L. REV. 1065, 1090 (1969) (doubting that any objective short of war would justify the imposition of long-term burdens on account of race) [hereinafter cited as *Recent Developments*].

[25]*Recent Developments* 1107.

[26]*Id.*

[27]Loving v. Virginia, 388 U.S. 1 (1967); Hirabayashi v. United States, 320 U.S. 81 (1943); *cf.* Hunter v. Erickson, 393 U.S. 385, 391 (1969).

[28]83 U.S. (16 Wall.) 36, 81 (1873).

14th amendment was to protect black citizens from unfriendly legislation on account of their race. In subsequent cases, where other minorities were the object of racial legislation, the hostility of the state purpose was noted.[29] Similarly, the Supreme Court, in *Brown v. Board of Education,*[30] condemned as invidious that discrimination which marked one race with the feeling of inequality. There is, then, an inference that the constitutionality of a benevolent racial purpose has been left open by the Court.[31]

The designation of race upon public records has been upheld, suggesting the possibility of a neutral state purpose in classifying on the basis of race,[32] However, in *Anderson v. Martin,*[33] the designation of the race of political candidates on election ballots was held unconstitutional, even though such designation would operate to aid minority candidates in certain districts. The vice of this system was not in its harm to minorities but in its injection of race into politics.[34] Similarly, in *Wright v. Rockefeller,*[35] the Court indicated that the apportionment of the legislature on the basis of race, even though its effect would be to aid minority representatives, would be unconstitutional. Thus, in the area of politics, racial classifications per se would appear to be unconstitutional, regardless of their benevolent effects on minorities.[36]

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[29]Cases cited note 15 *supra.* In Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886), the Court noted that there was no other reason for the regulation than hostility toward the Chinese race. Similarly, in Oyama v. United States, 332 U.S. 633, 663 (1948), it was noted that the decision stemmed from racial hatred. Since the Court, in Korematsu v. United States, 323 U.S. 214, 216 (1944), stated that racial animosity cannot be the source of a racial classification, it may be inferred that racial benevolence may be permissible.

[30]347 U.S. 483 (1954).

[31]O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L.J. 699, 705-06 (1971); Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race,* 67 MICH. L. REV. 1553, 1604-05 (1969).

[32]Virginia State Bd. of Elections v. Hamm, 230 F. Supp. 156 (E.D. Va. 1964), *aff'd per curiam sub nom.* Tancil v. Wolls, 379 U.S. 19 (1964). However, since the district court also declared unconstitutional the keeping of separate voting and residential records on the basis of race, it is doubtful whether this case can be interpreted as indicating the Supreme Court's endorsement of the use of race for statistical purposes. *See* O'Neil, *supra* note 31, at 708-09.

[33]375 U.S. 399 (1964).

[34]*Id.* at 402-03.

[35]376 U.S. 52, 57-58 (1964) (dictum). *But cf.* O'Brien v. Brown, 269 F.2d 563 (D.C. Cir.), *vacated,* 409 U.S. 1816 (1972).

[36]In Wright v. Rockefeller, 376 U.S. 52 (1964), the fact that Negro and Puerto Rican political leaders found advantage in existing representative districts lines was held irrelevant in light of the racial motive which spurred the drawing of those lines. The "separate-but-better-off" argument was found to be as constitutionally objectionable as "separate-but-equal":

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one becomes

A major difficulty in supporting the possibility of a noninvidious discrimination is whether there can ever be a genuinely benevolent purpose where race and ancestry are concerned. In American society, there are many individuals who are of different races who may be termed disadvantaged. In legislating benefits among citizens on the basis of their race, as in the laws of physics, there is the principle that for every action there is an equal and opposite reaction. As the benevolent action upon one group is refracted throughout the vast spectrum of minority groups in our society, its effect is to cause a detriment to others.[37] The impact upon other minorities of allowing blacks to demand proportional representation in employment has been explained by Mr. Justice Frankfurter:

> If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. . . .
>
> These considerations are most pertinent in regard to a population made up of so many diverse groups as ours. . . . [T]here could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portugese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. . . . The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostility by leave of law.[38]

In addition, the power of ethnic groups relative to one another tends to fluctuate from time to time. Courts are ill-equipped to determine in a particular context and with respect to a given issue whether a certain group is relatively disadvantaged.[39] This is an issue which has caused even social scientists difficulty, and which is the subject of ethnic dispute.[40] As pointed out by Professor O'Neil: "[T]oday's minority may

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> separatist; antagonisms that relate to race or religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

Id. at 62 (Douglas, J., dissenting).

[37]A preference for blacks in hiring or education would most adversely affect Mexican Americans, Puerto Rican Americans, second generation Americans and poor whites. Kaplan, *Equal Justice in An Unequal World: Equality and the Negro—The Problem of Special Treatment*, 61 Nw. L. Rev. 363, 375 (1966).

[38]Hughes v. Superior Court, 339 U.S. 460, 464 (1950).

[39]*Recent Developments* 1126.

[40]*Id.* Any action which would draw the government into ethnic disputes to an extent more than absolutely necessary may be suspect on that ground alone. Kaplan, *supra* note 37, at 378. This view is analagous to the avoidance by the courts of "excessive entangle-

become tomorrow's majority, and the group that needs protection and assistance today may someday be the oppressor."[41] Once preferences have been granted to a group it is reasonable to expect that the group will be reluctant to give them up.

Since the benevolence of any social purpose involving race is necessarily a value judgment, based upon the level of social and scientific thought at a particular point in history, that which is considered invidious today may be considered benevolent by future generations. This fluctuation of social thought is evident in our constitutional history regarding *Plessy v. Ferguson,*[42] where the Court held that the separation of the races was not invidious. Initially, the decision represented a retreat from the Court's position in *Railroad Co. v. Brown,*[43] in which the Court had determined that such separation was a denial of equality. Gradually, however, the *Plessy* position was eroded[44] until it was severely shaken by *Brown v. Board of Education,*[45] wherein the Court held that such separation constituted invidious discrimination. Thus, Justice Harlan's warning in his classic dissent in *Plessy* has proven to be accurate: "In my opinion, the judgment this day rendered will, in time prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case.*"[46]

Unlike the majority in *Plessy,* Justice Harlan based his dissent upon the premise that the 14th amendment neutralized race as a criterion for drawing classifications. Justice Harlan felt that the effect of the 14th amendment was to blind the Constitution to distinctions of race or ancestry and that no benevolent intent could justify the official classification of citizens according to race.[47] In light of this position, those decisions condemning racial discrimination are to be read as being

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ment" with religion. Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

[41]O'Neil, *supra* note 31, at 710.

[42]163 U.S. 537 (1896). The Court noted that the legal separation of the races does not imply the inferiority of one race to the other. *Id.* at 544.

[43]84 U.S. (17 Wall.) 445 (1873).

[44]It was held that railway passenger facilities could not be denied to Negroes because of small demand. McCabe v. Atcheson, T. & S.F. Ry., 235 U.S. 151 (1914). Equal facilities were denied in education, even where the state paid the tuition for Negroes to attend college out of state. Misouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). Finally, separation of the races in graduate and law schools was adjudged to be a denial of equality. McLaurin v. Oklahoma, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950). These decisions regarding racial separation reflect the social, moral, and political spirit of the times. Frank, *Can the Courts Erase the Color-Line?*, 2 BUFF. L. REV. 28, 29-30 (1952).

[45]347 U.S. 483, 494 (1954) (where the Court noted that regardless of psychological knowledge at the time of *Plessy v. Ferguson,* separation of the races causes feelings of inequality in the Negro).

[46]163 U.S. at 559 (Harlan, J., dissenting).

[47]*Id.*

based, not upon the invidious intentions of the state, but upon the very essence of racial discrimination as an invidious encroachment upon the dignity of the individual under the Constitution.[48] No state purpose, no matter how compelling or how benevolently designed, can ever justify treating citizens of one race differently from those of another.[49]

B. Compelling State Interest

To the extent that our legal system has accepted the premise that the state can have a purpose independent of invidious discrimination in drawing racial classifications, any such purpose is subject to "the most rigid scrutiny"[50] by the court passing on its constitutionality. That is, the racial classification must be necessary to, not merely rationally related to, the state purpose. This entails a showing that the use of nonracial alternatives is impossible.[51] Thus, in *Korematsu,* the exclusion of persons on the basis of ancestry was permitted since under the pressure of impending invasion there was no time for an inquiry as to loyalty on an individual basis.[52]

In addition, the state must show that the benefits to be realized by

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[48]Two Justices have indicated that the state can have no legitimate purpose in making the criminality of an act depend upon the race of the accused. McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., joined by Douglas, J., concurring). Another Justice has indicated that in joining in the majority opinion of Brown v. Board of Education, 347 U.S. 483 (1954), he upheld Mr. Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), adding: "In my judgment, the holding in *Brown* against racial discrimination was compelled by the purpose of the Thirteenth, Fourteenth and Fifteenth Amendments completely to outlaw discrimination against people because of their color." Harper v. Virginia Bd. of Educ., 383 U.S. 663, 677-78 n.7 (1966) (Black, J., dissenting).

Much to the chagrin of Mr. Justice Douglas, *Plessy v. Ferguson* has never been expressly overruled. Wright v. Rockefeller, 376 U.S. 52, 62 (1964) (Douglas, J., dissenting).

[49]It has been suggested that race, like religion, is a neutral criterion — a "constitutional irrelevance." Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring).

> The similarity between religious and racial discrimination has been pointed out: Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another.

Hirabayashi v. United States, 320 U.S. 80, 110 (1943) (Murphy, J., concurring).

Such conflicts over religion have been prevented by the policy of neutrality; that is, of not favoring one religion over another. Walz v. Tax Comm'n, 397 U.S. 664, 668-70 (1970); Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

[50]Korematsu v. United States, 323 U.S. 214, 216 (1944).

[51]McLaughlin v. Florida, 379 U.S. 184, 197 (1964) (Harlan, J., concurring); *Recent Developments, supra* note 24 at 1101.

[52]*Recent Developments* 1104.

taking the action will outweigh the hardship upon individuals who are classified by their race. In applying this test, the court determines the compelling nature of the state purpose through a delicate balancing process:

> In calculating the magnitude of the public need for the measure, the courts must consider both the extent of the benefits accruing to society and the degree of risk which will be incurred if a measure of that nature is not permitted. Similarly, the actual costs of the measure must be determined by examining both the importance of the individual or group rights infringed and the extent to which the measure will have long term adverse effects on those interests.[53]

The fact that in *Korematsu* the exclusion was temporary and in the interest of national defense tipped the balance in favor of the state interest.[54] However, that such a balancing of the individual right to be free from racial discrimination could ever be made prompted Justice Jackson in his dissent to warn that the extension of constitutionality to such an action is to set an ominous precedent for future generations.[55] He felt that the power to classify citizens according to race would allow individual liberties to be infringed upon whenever the state could come forward with what could be considered a compelling purpose.

Even beyond the fears expressed by Justice Jackson is the suggestion that the state need not even show that its legislative purpose is compelling where the purpose is to benefit a disadvantaged minority, since the danger to the affected class that ordinarily calls for strict scrutiny is not present.[56] According to this position, racial classifications

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[53]*Id.* at 1103.

[54]*Id.*

[55]Korematsu v. United States, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting):

> Much is said of the danger of liberty from the Army program from deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding military commander may revoke it all. But once a judicial opinion rationalizes such an order to show it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all times has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply into our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limits of its logic."

[56]O'Neil, *supra* note 31, at 709; *Recent Developments* 1107.

used to compensate for past injuries which were caused by past racial discrimination would not be subject to the general rule that race is irrelevant to a legitimate state purpose.[57] Moreover, this line of reasoning contends that race is not only what the classification is *based* upon, but is also the *purpose* of the classification. The position concludes with the suggestion that the "rational basis" test rather than the "strict scrutiny" test be used to pass upon the validity of this type of classification.[58]

However, regardless of the purpose of such racial discrimination, its effect can be to deny individuals a benefit on the basis of race. In this respect a policy of integration, currently considered to serve a noninvidious purpose, can operate in the same fashion as a segregation policy whenever one race becomes overrepresented.[59] In order to preserve integration, individuals of the race which is overrepresented must be denied admission. This potential denial of a benefit on the basis of race has been regarded as calling for a demonstration that the state purpose, even though noninvidious, is compelling.[60] This position, even though it would allow for classification by race, does indicate that there is something particularly onerous about basing a standard upon the race of an individual.

Regardless of the purpose for which they are to be used, racial classifications emphasize factors of genetics over which the individual has no control.[61] There is a constant danger that they will become

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[57]*Recent Developments* 1108.

[58]*Id. See* Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968).

[59]In Ortero v. New York City Housing Authority, 354 F. Supp. 941 (S.D.N.Y. 1973), the denial of public housing to blacks on the ground that the project would cross the "tipping point" was held to be a violation of their equal protection rights. The "tipping point" is the sociological term for the maximum amount of blacks that can be integrated without causing the project to become all black due to people of other races moving out. *See* Hellerstein, *The Benign Quota, Equal Protection, and the Rule in Shelley's Case*, 17 RUTGERS L. REV. 531 (1968); Navasky, *The Benevolent Housing Quota*, 6 How. L.J. 30 (1960).

This artificiality and imposition of restraints upon individual choice was a major objection to segregation. Note, *Is Racial Segregation Consistent with Equal Protection of the Law?*, 49 COLUM. L. REV. 629, 639 n.68 (1949). A similar point was made in Balaban v. Rubin, 14 N.Y.2d 193, 250 N.Y.S.2d 281, 285, 199 N.E.2d 375, 378 (1964) (Van Voorhis, J., dissenting):

> It is discrimination to admit a person because he is a Negro or a Pole, Catholic, Anglo-Saxon, Jew, and so on. If persons can be legally admitted because they belong to any of these groups, then they can be excluded for the same reason. . . . [When the position is] taken that any of these multiform groups are to be promoted in competition with other groups, it becomes discrimination, not integration.

[60]O'Neil, *supra* note 31, at 710.

[61]*Recent Developments* 1126-27.

embedded in the law to be used for oppression in future years. That their employment necessarily injects an element of racism into the law is indicated by *School Committee v. Commissioner,*[62] in which it was held that a census of a school which required the designation of students as "white" and "non-white" was not based on vague standards. The court relied upon a test based upon the ability of the "common man" to recognize distinctions among groups having physical characteristics different from those possessed by members of the white race.[63]

A more delicate issue arises where the courts are called upon to determine whether a particular individual comes under a particular racial classification.[64] Where an individual is of mixed racial origins, his apparent physical characteristics may be different from those generally recognized by the common man as traits of a particular race.[65] In *School*

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[62]349 Mass. 410, 208 N.E.2d 814 (1965). The use of racial classifications introduces into the law all the "pseudo-scientific" distinctions that are "chillingly reminiscent of racist analysis in Nazi Germany." 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 719 (1968).

State statutes defining a Negro are indicative of this. Some statutes base the definition upon the slightest trace of Negro blood in the individual. ALA. CODE ANN. tit. 1, § 2 (1958); ARK. STAT. ANN. § 41-808 (1947); GA. CODE ANN. § 79-103 (1964); TENN. CODE ANN. § 1-305 (11) (1971 Repl.); VA. CODE ANN. § 1-14 (1950). According to other statutes, the individual must have at least one-eighth Negro blood. FLA. STAT. ANN. § 1.01(b) (1961).

[63]This "common man" test which was used in School Committee v. Commissioner, 349 Mass. 410, 208 N.E.2d 814, 818 (1965), comes from Morrison v. California, 291 U.S. 82, 85-86 (1934), where it was noted that the "common man" would recognize that Chinese, Japanese, American Indians, and Philipine Americans would not be considered "white." For support of this test, the *Morrison* opinion relied upon, *inter alia,* Gray v. State, 4 Ohio 353 (1831), which was also cited with approval in determining the race of an individual in Plessy v. Fergusson, 163 U.S. 537 (1896).

[64]*See* Hurd v. Hodge, 334 U.S. 24, 27 (1948) (where Hurd maintained that he was a Mohawk Indian, but was found by the trial court to be a Negro); Reed v. State, 18 Ala. App. 353, 92 So. 511 (1922) (where the court ascertained that the defendant was an Indian or a Spaniard, but was found by the jury to be a Negro).

[65]G. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 13 (1910):

> It is absolutely impossible to ascertain the number of mulattoes — that is, persons having both Caucasian and Negro blood in their veins — in the United States. Mr. Baker says: "I saw plenty of men and women who were unquestionably Negroes, Negroes in every physical characteristic, black of countenance with thick lips and kinky hair, but I also met men and women as white as I am, whose assertions that they were really Negroes I accepted in defiance of the evidence of my own senses. I have seen blue-eyed Negroes and golden-haired Negroes; one Negro girl I had met had an abundance of soft, straight red hair. I have seen Negroes I could not easily distinguish from the Jewish or French types; I once talked with a man I took at first to be a Chinaman but who told me he was a Negro. And I have met several people, passing for white, who, I knew, had Negro blood."

A recent example of this problem of identity is the 1973 Miss Kentucky, who had lost

Committee v. Commissioner, it was determined that "borderline" cases would be determined on the basis of appearance.[66] The evidence relevant to such an issue was discussed in *Weaver v. State*,[67] where the defendant in a miscegenation case claimed to be white:

> It was proper to prove that defendant's grandfather had "kinky" hair. This is one of the determining characteristics of the negro. This also applies to the nose and other features. It is proper in a case of this kind to prove the race of defendant by description of any or all characteristics belonging to the negro race, and even a photograph has been held to be admissible.[68]

Litigating the race of an individual, described as "dirty business" by one author,[69] is nevertheless a necessary process whenever racial classifications are employed, regardless of the "benevolence" of the purpose.[70]

C. *Summary*

There are then, two views with respect to 14th amendment protection against racial discrimination.

One position is based upon the premise that the 14th amendment prohibits only that racial discrimination which is invidious. This position holds that to the extent that the state is able to show that the racial discrimination is based upon pressing public necessity or an intent to benefit a disadvantaged minority, such discrimination does not fall under the prohibition of the 14th amendment. Those cases holding racial discrimination unconstitutional are distinguished, under this view, in that the Court indicated that the racial classifications in those cases were drawn because of racial animosity. The position further contends that the prohibition against racial discrimination is not an absolute

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a previous black beauty contest because she was too white. The Commercial Appeal (Memphis), Sept. 6, 1973, at 24, col. 1.

A solution to this difficulty of racial identity was noted in Scott v. Raub, 88 Va. 721, 14 S.E. 178, 181 (1891), where, upon satisfactory proof of race to a court, an individual was issued a certificate verifying his race.

[66]349 Mass. 410, 208 N.E.2d 814, 818 (1965).

[67]22 Ala. App. 469, 116 So. 893 (1928). *See also* Rollins v. State, 18 Ala. App. 354, 92 So. 35 (1912) (where it was held that proof that a woman came from Sicily was not conclusive as to her being white or Negro); Keith v. Commonwealth, 165 Va. 705, 181 S.E. 283 (1935) (where a witness testified that defendant's grandmother had told her that defendant's grandfather was actually another man besides the colored party).

[68]22 Ala. App. 469; 116 So. at 895.

[69]Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387, 1422 (1962).

[70]The business could get especially "dirty" when, in order to gain a preference, persons might be expected to attempt to prove that they are members of the favored race. Kaplan, *supra* note 37, at 379.

freedom, but rather is relative to the value of the state purpose. The possibility of noninvidious racial discrimination, this position concludes, has been left open by the Court when necessary to a compelling state interest.

Another position rests upon the premise that the 14th amendment prohibits all forms of official discrimination on the basis of race. The Constitution, in light of the 14th amendment, is blind to distinctions of race or ancestry, recognizing the individual *qua* individual. Those cases stressing the invidious purpose of the state in discriminating against a racial group are consistent with the proposition that since all racial distinctions are per se invidious, whenever the state draws such distinctions it has demonstrated animosity toward the dignity of the individual. Under this interpretation, the value of the prohibition of the 14th amendment against racial discrimination is not to be determined vis-a-vis the purpose of the state, but is an absolute, founded upon the essence of the individual. This "absolute" quality is analagous to the protection against religious persecution and has the effect of neutralizing race as a basis for classification. This view holds that the function of the state is not to favor one race over the other, but to protect the individual against all discrimination on that basis.

II. *DeFunis*: A Logical Upgrowth From *Plessy* And *Korematsu*

A. Noninvidious Purpose

That the *DeFunis*[71] decision was based upon the constitutional position that would permit "noninvidious" racial discrimination is evidenced by its interpretation of *Brown v. Board of Education:* that only "invidious" racial discrimination is unconstitutional. While the effect of segregation is to stamp the Negro race with inferiority, no such effect is expected in the integration process by granting a preference to blacks.[72] Furthermore, integration is considered a sound educational policy in that it prepares students for a life in a multiracial society.[73] In addition, the effect of preferences for minorities will be to give minority

[71]DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1179 (1973).

[72]*Id.*, 507 P.2d at 1179; *Recent Developments* 1114. *See generally* Hobson v. Hansen, 269 F. Supp. 401, 492-508 (D.D.C. 1967). However, it may be difficult to predict the psychological consequences of the racial preference due to its effect on the motivation of the Negro, who will not know whether his success has come from his own merits or from the preference. Kaplan, *supra* note 37, at 378.

[73]Sweatt v. Painter, 339 U.S. 629, 634 (1950); DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973). In McLaurin v. Board of Regents, 339 U.S. 637, 641-42 (1950), however, the importance of acceptance of the individual on personal merits was stressed. *See* materials cited note 59 *supra*.

groups representation in the legal system.[74] Since the preference is in favor of those minorities designated "culturally deprived," the program is not invidious but "compensatory" in nature. Consequently, the racial preference is not constitutionally defective since it is not "invidious." Recognizing, however, that the effect of the minority admissions policy is not benevolent upon those who will be displaced by it, the *DeFunis* court required that the law school's consideration of race be necessary to a compelling state interest.[75]

B. Necessity of the Racial Classification

While a policy of aiding all economically or socially deprived students, as well as an open admissions policy, has been suggested as a nonracial alternative to a preference for minorities, these methods do not adequately ensure the representation of minority students.[76] Similarly, while a program in the law school emphasizing civil rights and poverty law would train attorneys in an area of the law particularly beneficial to minority group members, this might not directly achieve the purpose of actually bringing representatives of minority groups into the legal system.[77] Furthermore, since the purpose of the preference is aimed at remedying racially related deprivations, and not deprivation in general, race would appear to be a necessary criterion.[78]

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[74]That minority lawyers will better serve the interests of the minority community than other lawyers trained in that field is based upon the epistomological assumption that the best method of gaining knowledge of the problems of minority groups is to be a member of such a group. *Cf.* Procelli v. Titus, 431 F.2d 1254 (1970) (where the promotion process sought administrators with "sensitivity" and "awareness" to the problems of the minority community of Newark). However, it has been pointed out that there is no assurance that minority persons will not be just as ill served by members of their own community as by middle-class white attorneys; nor is there any assurance that minority lawyers will return to their communities to practice law. Rabinove, *supra* note 3, at 388-89.

A further "advantage" of encouraging minority representation is said to be the "symbolic effect" upon minority persons of seeing persons of their own color in the legal system. Kaplan, *supra* note 37, at 388. Whether this is encouraging racial pride or racial prejudice may be a difficult factor to determine, and necessarily depends upon the point of view of the person making the judgment. *Compare* Archer Laundry Co., 150 N.L.R.B. ¶ 9061 (1965) (holding that likening anti-union advocates to anti-black advocates was an appeal to "racial self-consciousness") *with* Sewell Mfg. Co., 138 N.L.R.B. 11, 504 (1962) (holding that calling attention to the fact that the union had supported the N.A.A.C.P. was an appeal to racial animosity).

[75]DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1182 (1973); Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 100 (1970).

[76]O'Neil, *supra* note 31, at 745-46. *See also* Comment, *Current Legal Education of Minorities: A Survey*, 19 BUFF. L. REV. 639 (1970).

[77]*See* note 74 *supra*.

[78]Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968).

C. Compelling State Purpose

Assuming *arguendo* the necessity of racial classification preferences, for the classification to be constitutionally valid, the purpose of the state in favoring one race over another must be compelling; that is, the benefit flowing from preferring minority applications must outweigh the hardship suffered by those individuals displaced by such a policy.

That DeFunis had been accepted by other law schools does not mitigate his being denied admission by the University of Washington because of a policy oriented toward racial factors.[79] The constitutionality of the admissions procedure of the University of Washington must stand upon its own merits, since it has been held that where a state provides legal education, it must do so upon equal terms for all its residents.[80]

The fact that the law school did not seek a "quota" but rather a "reasonable representation" of minorities is offered by the court to show that DeFunis was not denied admission solely because of his race.[81] This line of reasoning parallels that of cases justifying "affirmative action plans" under which contractors on federal projects have been required by Executive order to commit themselves to a policy of hiring minority employees.[82] Although the purpose of these affirmative action plans is to reach a designated "percentage" or "range" of minority employees, they have not been invalidated as quotas since the percentages are flexible and failure to achieve them does not result in automatic forfeiture of the awarded contracts.[83] Instead, the employer is merely required to use "good faith" in attempting to achieve these percentages. Thus,

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1968). *See* O'Neil, *supra* note 31, at 717 (stating that there appears to be no apposite case law on this subject); Comment, *The Philadelphia Plan and Strict Racial Quotas on Federal Contracts*, 17 U.C.L.A.L. REV. 817, 832 n.66 (1970).

[79]DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1181 n.11 (1973).

[80]Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349 (1938) (holding that where the state provides legal training, it must do so on the basis of equality of right for all citizens).

[81]DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1185 (1973).

[82]These "special area programs" have been set up by the Office of Contract Compliance under the authority of Exec. Order No. 11246, 30 Fed. Reg. 12,319 (1965) *as amended by* Exec. Order No. 11375, 32 Fed. Reg. 14,303 (1967) and Exec. Order No. 11478, 34 Fed. Reg. 12,985 (1969). The Philadelphia Plan was upheld in Contractors' Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971); *accord,* Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970); *cf.* Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969). *See generally* Comment, *Race Quotas,* 8 HARV. CIV. RTS. & CIV. LIB. L. REV. 128 (1973).

[83]Contractors' Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 171-72 (3rd Cir. 1971) (holding that the antipreference provision of the Civil Rights Act of 1964, § 703(j), 42 U.S.C. § 2000e-2(j), is a limitation on the terms of the Act only, and not on the power of the President to act through Executive orders); Joyce v. McCrane, 320 F. Supp. 1284, 1291 (D.N.J. 1970) (distinguishing between "quotas" and "goals"); Comment, 30 MD. L. REV. 114, 128 (1970).

it is not necessary for the employer to deny employment to a qualified nonminority applicant.[84] It is submitted, however, that this rationale is defective. An employer cannot realistically be expected to jeopardize a federal government contract by failing to reach his goal of minority employees.[85] Since a showing of "good faith" may be a difficult process, the simplest method to insure retention of the government contract is for the employer to hire the specified number of minority group individuals.[86] Furthermore, the fact that a flexible percentage permits the consideration of other factors along with race, making it impossible to determine the real basis of employment denial, does not cure the defect since the 14th amendment forbids all forms of racial discrimination — "sophisticated as well as simple-minded."[87] This line of reasoning is merely an exercise in semantical gymnastics to avoid an equal protection challenge. The vice of the system is simply that if DeFunis had been of a different race, he would have been treated more leniently.

A more recent line of cases, however, has upheld even a fixed racial quota. In *United States v. Local Union 212 IBEW*,[88] an affirmative action plan requiring an 11 percent quota was upheld. The plan required a fixed 11 percent quota of blacks and the granting to minority group members of an absolute preference over nonblack applicants of equal or better qualifications. In *Southern Illinois Builders Association v. Ogilvie*,[89] the court used *Swann v. Charlotte-Mecklenburg Board of Education*[90] as the rationale for requiring the use of specific ratios in hiring as a means of remedying past employment discrimination. Similarly, in *Carter v. Gallagher*,[91] *Swann* was used as authority for ordering a hiring ratio of 1 minority applicant to 2 nonminority applicants until

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[84]This line of reasoning concedes that a denial of employment to a white applicant on the basis of race is a violation of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a). Comment, 4 RUTGERS-CAMDEN L.J. 113, 126 (1972).

[85]Comment, *supra* note 84, at 126.

[86]A mere showing of good intentions may not be sufficient, but additional proof may be required that the effect of the criteria used in hiring was not discriminatory. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In order to avoid proving "good faith" the employer will hire according to race. Comment, 30 MD. L. REV. 114, 134 (1970); Comment, 32 MONT. L. REV. 249, 260 (1971); Comment, *supra* note 84, at 134.

[87]Wright v. Rockefeller, 376 U.S. 52, 68-69 (1964) (Goldberg, J., dissenting); *cf.* Cooper v. Aaron, 358 U.S. 1, 17 (1958) (holding that government cannot discriminate, whether directly or indirectly).

Where race is an impermissible factor, it cannot be allowed simply because it was not the only reason for the discrimination. Partial racial discrimination has been condemned in the area of real estate transactions. Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1971).

[88]472 F.2d 634 (6th Cir. 1972).

[89]471 F.2d 680 (7th Cir. 1972).

[90]402 U.S. 1 (1971).

[91]452 F.2d 315, 331 (8th Cir. 1971).

20 minority employees had been hired. The constitutionality of the effect of this extension of *Swann* to admissions and hiring has been seriously questioned. The dissent in *Carter*, contending that racial preferences in hiring were unconstitutional, in distinguishing *Swann*, noted:

> This case is distinguishable from *Swann v. Charlotte-Mecklenburg Board of Education* relied upon by the majority in that whites have no right to insist upon segregated schools, while white as well as black applicants cannot be denied employment on the basis of race.[92]

Similarly, the dissent in *DeFunis* made the following distinction in the area of education:

> There is no genuine parallel between Mr. DeFunis's [*sic*] case and the case of the children required to ride the busses. . . . Putting one child on a bus to ride to school did not operate to take away another's seat in the classroom. . . .
>
> Here we have precisely the opposite. Putting some applicants into the classroom deprived a qualified applicant of his seat there. It operated to deprive him thereby of the equal protection of the laws and at the same time granted to others privileges and immunities not available to him on equal terms.[93]

These dissents are calling attention to the mandate of the strict scrutiny test that the showing of a legitimate state purpose merely begins, rather than ends, the inquiry where race is involved. As expressed in *McLaughlin v. Florida*,[94] even assuming that the state purpose is constitutional, "it does not follow that there is no constitutional limit to the means which may be used to enforce it."[95] This rule has its roots in *Buchanan v. Warley*,[96] in which a Louisville, Kentucky ordinance denying black citizens the right to purchase land in areas where whites were in the majority was held to be a denial of an individual right. The Court, recognizing the legitimacy of the state's purpose in separating the races as expounded in *Plessy*, nevertheless distinguished the two cases on the ground that while no one in *Plessy* was denied passage on the train by the segregated seating requirements, in *Buchanan*, a denial of the right to property was involved. The Court therefore concluded that the "noninvidious" racial purpose could not be extended to the point of denying an individual right. To the extent that *Swann* can be read as recognizing integration of races in schools as sound educational policy,

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[92]*Id.* at 332 (Van Oosterhout, J., dissenting).

[93]DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1199 (1973) (Hale, C.J., dissenting).

[94]379 U.S. 184 (1964).

[95]*Id.* at 195, *quoting from* Oyama v. California, 332 U.S. 633, 646-47 (1948).

[96]245 U.S. 60 (1917).

its extension into other areas must be limited in light of the principles expounded in *Buchanan.* Further, in *Swann* the Court expressed a limitation as to the extent of its equity power, even in the area of remedying present vestiges of de jure segregation.[97] To apply the remedies of school desegregation cases outside that context, in situations involving admissions and hiring policies, is to run afoul of an individual's rights to an opportunity to obtain an education and to earn a living free from distinctions because of race.

The hardship imposed upon the individual, according to the test adopted in *DeFunis,* must be weighed against the urgency of the state's purpose in remedying the effects of racial discrimination.[98] It appears that the *DeFunis* test attempts to balance the state's purpose of protecting the rights of individuals who have suffered because of their race against the rights of those who have not. A careful examination of the logic upon which the test is based, however, reveals that, in *DeFunis,* the state purpose has become far removed from its original aim of vindicating individual rights.

Where an individual's application for employment has been rejected on the basis of his race, the discriminatory employer can be ordered to hire him for the next vacancy.[99] Since the action of the employer has denied this individual a job which he would have had but for his race, the hiring of this applicant for the next vacancy vindicates his individual right. Certainly this remedy would be as appropriate where the discriminatory action of the employer prevented the individual from actually applying. If it can be shown that the individual would have been employed had his intention of applying not been thwarted, then the mere formality of actually filing an application should not be the determining factor in granting the remedy.[100] In *United States v. Sheetmetal Workers,*[101] this rationale was extended to a situation in which minority tradesmen worked in the locality of the discriminatory union and were "acutely aware" of its policy. A specific act of discrimination against these tradesmen was not necessary to justify a remedy since their intimate knowledge of the union's policy was presumed to have deterred them from attempting to join. In *Carter v. Gallagher,*[102] as a remedy for past discrimination in hiring, a fire department was required

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[97]402 U.S. at 22.

[98]Authorities cited note 75 *supra* and accompanying text.

[99]*See* Local 53 of Int'l Ass'n of Heat & Frost Workers v. Vogler, 407 F.2d 1047, 1053 (5th Cir. 1969).

[100]This remedy is analogous to hiring and reinstatement orders where an individual has been denied employment due to union activity. Phelps Dodge Co. v. NLRB, 313 U.S. 177, 188 (1940).

[101]416 F.2d 123 (8th Cir. 1969).

[102]452 F.2d 315 (8th Cir. 1971).

to extend hiring preference to all members of the black and Spanish-American community in the Minneapolis, Minnesota area by hiring 1 minority applicant for every 2 nonminority applicants until 20 minority employees had been hired. Even though the class to be granted a preference by the court's remedy lacked any close connection with the discriminatory agent and even though their awareness of the prior discriminatory policy was considerably less than in previous cases, the presumption was made that the previous hiring policy of the fire department had operated to the detriment of all minority persons in the area whose presumed knowledge of the policy deterred them from applying for a position with the department.

It may seem impossible to extend a preference for minority applicants over nonminority applicants beyond cases involving a discriminatory agent, since this would exceed the basis for the presumption that those members of the group who are to be preferred have been harmed by racial discrimination.[103] However, it has been stated that merely to have been a black in America is to have suffered an injury on the basis of race, regardless of the economic or social situation of the particular individual.[104] That this presumption is the basis for the extension of a racial preference in *DeFunis* is clearly indicated by the court's statement that: "[T]he mere fact that a minority applicant comes from a relatively more affluent home does not mean that he has not been subjected to psychological harm through discrimination."[105]

According to this logic, neither an indication of individual hardship nor even a tenuous connection with a specific act of discrimination is necessary for the granting of a preference. This presumption has been extended to include an entire racial group. Thus, the state purpose for granting a preference has been stretched far beyond a remedy for individual injury in an attempt to vicariously vindicate the general effects of discrimination upon an entire racial group. The *DeFunis* decision validated this purpose to the detriment of other applicants outside the favored races.

The fact that other nonminority persons have been preferred over *unidentified* minority persons in the past is irrelevant to the present right of individuals to be accepted upon criteria other than their race.[106]

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[103]It is hard to justify preference for New York Negroes on the ground that Alabama Negroes are the victims of discrimination. Kaplan, *supra* note 37, at 375.

[104]Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. REV. 1063, 1072-73 (1968).

This rationale is to be distinguished from that which is based upon aiding all disadvantaged individuals, regardless of race. Fortec Constructors v. Kleppe, 350 F. Supp. 171, 173 (D.D.C. 1972).

[105]DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1187 (1973).

[106]The essence of the right to equal protection is individual and personal and does not depend upon group considerations. McCabe v. Atcheson T. & S.F. Ry., 235 U.S. 151, 161

Those nonminority individuals applying for admission have not benefitted from any previous discriminatory policy in admissions or hiring. This situation is clearly distinct from those cases in which minority applicants have been hired, but were segregated into a separate division with lower pay and working standards.[107] In such cases, where no transfer is allowed out of the less privileged division, or where seniority for promotions to vacancies in the more privileged division is determined by time worked only in that division, such systems have been held in violation of Title VII of the Civil Rights Act of 1964.[108] In these situations, every time a vacancy arises, the seniority system, which is based upon previous racial discrimination, operates to favor the white employee over the minority employee who has worked longer for the company, since but for the previous discriminatory system, the minority employee would have been promoted to the vacancy. The remedy granted in this type of situation is to determine seniority based on the entire time worked in the company, rather than the time worked in the preferred division only. The rationale of this remedy is not to favor one race over the other, but to eradicate a system which unnecessarily retards the advancement of individuals because of their race.[109] White employees have not been permitted to retain seniority advantages at the expense of black employees.[110] However, applicants for employment have not benefitted from previous discriminatory practices, as summed up in *Carter v. Gallagher*:

(1914); Note, 30 NEB. L. REV. 69, 77 (1950).

[107]United States v. Chesapeake & O.R.R., 471 F.2d 582 (4th Cir. 1972); United States v. St. Louis - S.F. Ry., 464 F.2d 301 (8th Cir. 1972); United States v. Bethlehem Steel Co., 446 F.2d 652 (2nd Cir. 1971); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[108]Cases cited note 107 *supra*. Such seniority systems are not protected by the exemption for "bona-fide seniority systems" of the Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h). United States v. Bethlehem Steel Co., 446 F.2d 652, 659 (2d Cir. 1971); Local 189, Papermakers and Paperworkers v. United States, 416 F.2d 980, 994-95 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 514 (1968).

[109]United States v. St. Louis-S.F. Ry., 464 F.2d 301, 307-08 (8th Cir. 1972); United States v. Bethlehem Steel Co., 446 F.2d 652, 658 (2d Cir. 1971).

[110]The advantages gained by the white employees under the departmental seniority system are not vested rights but expectancies which would not exist but for the past racial discrimination. United States v. St. Louis-S.F. Ry., 464 F.2d 301, 312 (8th Cir. 1972); United States v. Bethlehem Steel Co., 446 F.2d 652, 663 (2d Cir. 1972). The fact that the departmental seniority system is required by the union contract with the company does not affect the power of the court to grant the remedy. United States v. Jacksonville Terminal Co., 451 F.2d 418, 454 (5th Cir. 1971). *See also* J. I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944).

> Present and future applicants . . . are in no way responsible for past discrimination. Plaintiffs have not shown that any plaintiff now seeking employment has personally suffered as a result of past discrimination by being denied employment over a less qualified white person. Past general racial discrimination against Blacks under the circumstances of this case does not justify unconstitutional present racial discrimination against white applicants.[111]

Nor is the granting of a racial preference justified by those cases which have nullified hiring criteria on the ground that they operate to discriminate on the basis of race. Where a union has a history of excluding blacks from membership, an admissions policy which is restricted to relatives of present members operates presently to exclude persons on the basis of past discrimination.[112] Similarly, where the requirement of a high school diploma or a non-job-related test operates to exclude those who have been denied an education on the basis of their race, such devices operate as "built in head winds" against those who have suffered discrimination.[113] The rulings in these cases are based upon the rationale which invalidated the "grandfather clauses" and literacy tests which operated to deny the right to vote on the basis of race.[114] The fact that such criteria appear to be racially neutral does not conceal their underlying racially discriminatory effect.[115] That these remedies do not operate to favor one race over the other was made clear by the Court in *Griggs v. Duke Power Co.*:

> [T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[116]

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[111]452 F.2d 315, 332 (8th Cir. 1971) (Van Oosterhout, J., dissenting).

[112]Local 53 of Int'l Ass'n of Heat & Frost Workers v. Vogler, 407 F.2d 1047, 1053 (5th Cir. 1969).

[113]Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *DeFunis* did not reach the issue as to whether the LSAT is culturally biased. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1183 n.13 (1973). *See generally* Comment, *Equal Protection & Standardized Testing*, 44 Miss. L.J. 900 (1973) (for a discussion of the constitutional objections to the LSAT and other standardized tests).

[114]Gaston County v. United States, 395 U.S. 285 (1969) (holding that literacy tests abridge the right to vote of those who have been denied an education on account of race); Lane v. Wilson, 307 U.S. 268, 275 (1939); Guinn v. United States, 238 U.S. 347 (1915) (invalidating the "grandfather" clauses as racially discriminatory).

[115]Cases cited note 114 *supra*. *See also* North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971).

[116]401 U.S. at 430-31.

The rationale for granting preferences to members of certain races rests not upon the purpose of remedying discrimination directed against individuals, but in eliminating effects of racial discrimination due to its influence on society. Violence and civil disorders have been linked to racial imbalances.[117] *DeFunis* hypothesizes that if minorities are to live within the rule of law, they must be represented in the legal system.[118] To employ racial preferences as a means to this end, however, is to confuse equality of opportunity with equality of result. The Constitution guarantees the former only.[119] The fact that remedies consistent with the Constitution do not yield a result acceptable to some commentators cannot justify the use of preferences to the detriment of those outside the favored race.[120]

III. Conclusion

That racial discrimination should be employed in the solution of social problems is not a novel argument. It is an ironic echo of the rationale advanced in past decades to support a different solution to the racial problem. When the Court was presented with this argument, its answer was emphatic: "Today, no less than fifty years ago, the solution

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[117]Note, *The Philadelphia Plan: Remedial Racial Classification in Employment,* 58 Geo. L. J. 1187, 1208 (1970); Note, *Minority Workers and the Continuing Effects of Racial Discrimination—The Limits of Remedial Treatment*, 58 Iowa L. Rev. 143, 169 (1972); Comment, *The Philadelphia Plan and Strict Racial Quotas on Federal Contracts,* 17 U.C.L.A.L. Rev. 817, 836 (1970). *See generally* 1968 National Advisory Comm'n on Civil Disorders Report.

[118]DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, 1184 (1973).

[119]Hernandez v. Texas, 347 U.S. 475, 482 (1954); Akins v. Texas, 325 U.S. 398, 403 (1945); Gibson v. Mississippi, 162 U.S. 565, 580 (1896) (emphasizing the right of all persons not to be excluded due to race from jury duty, but expressly rejecting the idea of a right to proportional racial representation). "The number of our races and nationalities stands in the way of evolution of such a concept of due process . . . ." 352 U.S. at 403. *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971) (where the Court rejected any substantive right to proportional representation); Wright v. Rockefeller, 376 U.S. 52, 59 (1964) (Douglas, J., dissenting).

[120]Southern Illinois Builders Ass'n v. Ogilvie, 327 F. Supp. 1154, 1159 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972) (suggesting that the interests of the individual must be balanced against the societal interest in eliminating discrimination against minorities); Hughes, *Reparations for Blacks*?, 43 N.Y.U.L. Rev. 1063, 1073 (1968) (contending that discrimination in reverse should be regarded as a short-term measure for meeting a crisis of "thundering urgency"); Note, *Minority Workers and the Continuing Effects of Racial Discrimination—The Limits of Remedial Treatment*, 58 Iowa L. Rev. 143, 169 (1972) (suggesting that the need for compensatory treatment outweighs the interest of the individual); Comment, *The Phildelphia Plan and Strict Racial Quotas on Federal Contracts,* 17 U.C.L.A.L. Rev. 817, 831 (1970) (contending that the state's purpose of ending discrimination against minorities outweighs the effect of quotas to deny jobs to white workers); Comment, 32 Mont. L. Rev. 249, 263 (1971) (contending that minority "goals" in employment will eliminate a problem that has been here too long).

to the problems growing out of race relations cannot be promoted by depriving citizens of their constitutional rights and privileges."[121]

Whether the Court reaches this conclusion regarding *DeFunis* will depend upon the view it takes of the 14th amendment protection against racial discrimination. To affirm *DeFunis* is to sustain the position which lies at the heart of *Plessy v. Ferguson,* that the prohibition against racial discrimination is relative to its purpose within a given social context. This principle will be handed down to those in power in the future, who will draw racial classifications according to their concept of social good, whatever it may be at that time.

To overrule *DeFunis* is to recognize that the prohibition of the 14th amendment is directed against all forms of racial discrimination, without regard to its purpose in the judgment of any particular society. To base the protection against racial discrimination upon the essences of the individual, rather than upon the fluctuating trends of social thought, is the more enduring guarantee of liberty, and more clearly reflects the concept that "the equal protection of the laws is a pledge of the protection of equal laws."[122]

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[121]Watson v. Memphis, 373 U.S. 526, 539 (1963). This is a reference to Buchanan v. Warley, 245 U.S. 60, 80-81 (1917): "That there exists a . . . difficult problem arising from . . . race . . . may be freely admitted. But its solution cannot be promoted by depriving citizens of constitutional rights and privileges." *Cf.* Cooper v. Aaron, 358 U.S. 1, 16 (1958).

[122]Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

PRETRIAL IDENTIFICATION CONFRONTATIONS

I. Introduction

In many criminal cases there are eyewitnesses to the crime. Since these individuals have had contact with the perpetrator of the crime, eyewitnesses can serve as an integral part in the final apprehension of the criminal by identifying him at a pretrial confrontation. All too often, however, the procedures used by the police in eliciting identifications from eyewitnesses leave a great deal to be desired, and as a result can lead to misidentification.[1] Although these confrontations occur prior to trial, their importance is often as great as that of the trial itself. A witness' unclear memory of the suspect prior to an identification confrontation can be converted into a more positive identification at the confrontation and may become unequivocal by the time of trial.[2] Therefore, it is clear that such confrontations are crucial to the suspect. Because of the importance of these confrontations it is surprising that so few guidelines exist to govern identification confrontations. This comment will explore the main types of pretrial identification confrontations: corporeal lineups,[3] showups,[4] and photographic lineups.[5] The possibilities of prejudice inherent in the conduct of such confrontations will be explored and suggestions will be offered as to how the prejudice could be lessened.

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[1]United States v. Wade, 388 U.S. 218, 228 (1967).

[2][O]nce a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may . . . for all practical purposes be determined there and then, before the trial.

Id. at 229, *citing* Williams & Hammelmann, *Identification Parades, Part I*, 1963 Crim. L. Rev. 479, 482; *accord,* Time, April 2, 1973, at 59.

[3]For purposes of this comment the term corporeal lineup is defined as an identification confrontation between an eyewitness to a crime and an *array* of individuals from which the eyewitness is asked to identify the perpetrator of the crime. Lineup denotes the assembly of more than one confrontation participant. For other definitions see 25 Words and Phrases 31 (Supp. 1973).

[4]For purposes of this comment the term showup is defined as a confrontation between the eyewitness and the suspect conducted shortly after the alleged crime. In many cases these confrontations are on a one-to-one basis. For other definitions see 39 Words and Phrases 38 (Supp. 1973).

[5]For purposes of this comment the term photographic lineup is defined as an identification confrontation where an eyewitness is presented an array of photographs from which he is asked to identify the perpetrator of the crime.

[6]The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

II. The Right to Counsel[6]

A. Corporeal Lineups and Showups

The Supreme Court, in *Powell v. Alabama*,[7] stated that the right to counsel is a "fundamental right" and an accused is entitled to the presence of counsel at any time when a "substantial right" may be affected. It has never been seriously doubted that an accused has the right to the presence of counsel at trial, especially when a serious crime is involved; but, in recent times the right to counsel has been extended far beyond the trial stage.[8] The right is no longer limited to cases involving serious crimes but has been extended to all cases where the defendant faces the possibility of even 1 day's loss of liberty.[9] The Supreme Court has further provided that counsel should be appointed for indigents, regardless of whether the case involves a felony or a misdemeanor.[10] With this expanding application of the right to counsel, a determination of how the expansion has affected pretrial identification confrontations is in order.

On June 12, 1967, the Supreme Court considered three cases dealing with pretrial identification confrontations and the corresponding right to counsel. In *United States v. Wade*[11] a suspect was indicted for robbery and then subjected to a lineup held in the absence of his counsel. In considering this case the Court noted that because identification confrontations are "riddled with innumerable dangers"[12] that could prejudice the identification of a suspect, and because once a suspect is identified at a pretrial confrontation the witness is not likely to go back on his word at the trial,[13] the post-indictment lineup should be considered a critical stage of the prosecution and as such the accused should be entitled to the presence of counsel.[14] The Court felt that the presence of counsel would better enable the accused to reconstruct any unfairness at the confrontation and would provide an avenue for the suspect to attack the credibility of the witness' courtroom identification.

The second case considered was *Gilbert v. California*.[15] In this case

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[7]287 U.S. 45 (1932).

[8]Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel during custodial interrogation); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal); Townsend v. Burke, 334 U.S. 736 (1948) (right to counsel at sentencing).

[9]Argersinger v. Hamlin, 407 U.S. 25 (1972).

[10]Gideon v. Wainwright, 372 U.S. 335 (1963).

[11]388 U.S. 218 (1967).

[12]*Id.* at 228.

[13]*Id.* at 229.

[14]*Id.* at 236-37. Prior to *Wade*, however, at least one case had held that the right to counsel was not applicable to lineups. *See, e.g.*, People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), *cert. denied*, 375 U.S. 994 (1964).

[15]388 U.S. 263 (1967).

the defendant, as in *Wade*, was compelled to participate in a post-indictment lineup in the absence of his counsel. The Court restated its holding in *Wade* and unequivocally held that police conduct of such a lineup without notice to counsel denies the accused his sixth amendment right to counsel.[16]

The third in the trilogy of lineup cases was *Stovall v. Denno.*[17] In *Stovall* the Court held that *Wade* and *Gilbert* would be applied prospectively only. One reason given for denial of retroactivity was the Court's confidence that most lineups conducted in the absence of counsel in the past were conducted fairly and without prejudice to the accused at the trial.[18] The Court further reasoned that retroactive application of *Wade* and *Gilbert* would "seriously disrupt administration of our criminal laws."[19] *Stovall* has also been interpreted to mean that the fairness of confrontations occurring prior to June 12, 1967, should be determined on the basis of whether the confrontation was unnecessarily suggestive and conducive to irreparable mistaken identification as evidenced by the totality of the circumstances surrounding the confrontation.[20]

An analysis of these three cases yields two basic propositions. First, a suspect is entitled to the presence of counsel at post-indictment lineups. Second, this right is applicable only to lineups occurring after June 12, 1967. Though these propositions seem absolute, questions do arise. One such fundamental question is whether the right to counsel is actually limited to post-indictment lineups or whether the *Wade* Court intended the right to apply to *all* lineups and used the phrase "post-indictment" merely to refer to the facts of the *Wade* case. Following the *Wade-Gilbert-Stovall* trilogy, the state courts were forced to decide this question. Many courts chose to follow a strict interpretation of *Wade* and apply the right only to confrontations occurring after the indictment.[21] Other courts ignored the phrase "post-indictment" and cited *Wade* to support the proposition that *all* lineups are critical.[22] Still other courts specifically stated that *Wade* was not limited to lineups occurring

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[16]*Id.* at 272.

[17]388 U.S. 293 (1967).

[18]*Id.* at 300. *But see* dissents by Justices Douglas and Black who each felt that the *Wade* and *Gilbert* decisions should be applied retroactively.

[19]*Id.* at 300.

[20]*Id.* at 302.

[21]See Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968), *cert. denied*, 393 U.S. 1034 (1969), which was the first case decided under the prospective application of *Wade* (the confrontation occurred after June 12, 1967, and therefore *Wade* rather than *Stovall* was controlling). The court in *Bumpus* held that a pre-indictment showup could be distinguished from a post-indictment lineup and that the right to counsel did not extend to the former. *See also* Robinson v. State, 237 So. 2d 268 (Fla. 1970).

[22]People v. Williams, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971); Hays v. Commonwealth, 467 S.W.2d 354 (Ky. 1971), *cert. denied*, 405 U.S. 990 (1972).

after the indictment.[23]

The ambiguity as to when the right to counsel must accompany an identification confrontation has been clarified to some extent by the Court's decision in *Kirby v. Illinois.*[24] In that case a suspect was identified at the police station shortly after his arrest and prior to being indicted. The suspect was not represented by counsel, nor was he advised of his right to be represented. The Supreme Court affirmed the lower court's finding that the suspect was not entitled to the presence of counsel at this identification confrontation. The Court, in an attempt to remedy the lack of uniformity then existing among the state courts, stated that the right-to-counsel requirement set forth in *Wade* was not applicable to pre-indictment confrontations.[25] The Court's choice of words deserves attention. Although the *Kirby* case involved a showup, the Court does not appear to limit its holding to showups, but instead appears to extend the holding to cover all pre-indictment confrontations.[26] If one interprets *Kirby* literally, the indictment is the critical point in time, and identification confrontations occurring before the indictment will not be held invalid merely because the identified suspect was not represented by counsel.

B. Photographic Lineups

Though discussion of identification confrontations has to this point related solely to corporeal lineups and showups, other forms of identification exist, one of which is the photographic lineup. At a photographic lineup a witness is shown an array of photographs from which he is asked to identify the perpetrator of the crime. Although this form of identification differs from the corporeal lineup, some of the dangers inherent in the corporeal lineup also exist in the photographic lineup. Because of the danger of possible prejudice the question whether the right to counsel applies to such confrontations arose. Many cases held that the right to counsel delineated in *Wade* was not applicable to photographic lineups.[27] Other cases dealt with the question without deciding it.[28] Still

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[23]People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); People v. Hutton, 21 Mich. App. 312, 175 N.W. 2d 860 (1970); Annot., 39 A.L.R.3d 487 (1971).

[24]406 U.S. 682 (1972).

[25]*Id.* at 688-90.

[26]It is interesting to compare the Court's handling of identification confrontations with its handling of custodial interrogation. In Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964), the Court held that the right to counsel was applicable to custodial interrogation whether it be pre-indictment or post-indictment. Perhaps the custodial interrogation cases can be distinguished from the identification confrontation cases because of the importance of immediate identification while the suspect's identity is fresh on the witness' mind.

[27]*See, e.g.*, United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v.

other cases held *Wade* to be applicable, at least in some measure, to photographic lineups.[29]

Probably the first landmark decision in the area of photographic lineups was *Simmons v. United States*.[30] In that case the defendant was identified from a group of photographs. Defendant did not claim that he was entitled to counsel but instead claimed that the procedure employed was unduly prejudicial. In addressing the defendant's claim the Court stated that an identification stemming from a photographic lineup would be set aside only if "the . . . procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[31] Even though the *Simmons* case did not specifically address the question of *Wade*'s applicability to photographic lineups, it may be inferred from *Simmons* that the right to counsel applies to photographic lineups only if the absence of counsel would create a "substantial likelihood of irreparable misidentification." Many subsequent cases, however, cited *Simmons* and at the same time denied the applicability of *Wade* to photographic lineups.[32] Although their reliance on *Simmons* was not exactly on point, these cases appeared to reflect the clear majority view.

In the recent case of *Ash v. United States*,[33] however, the Court of Appeals for the District of Columbia reached the opposite result; *i.e.*, *Wade* is applicable to photographic lineups. Even though the result reached in *Ash* was a minority view inconsistent with the view of nine other circuits,[34] the decision was nonetheless important for two reasons:

Bennett, 409 F.2d 888 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969); United States v. Robinson, 406 F.2d 64 (7th Cir. 1969); McGee v. United States, 402 F.2d 434 (10th Cir.), *cert. denied*, 394 U.S. 908 (1968); People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971); Baldwin v. State, 5 Md. App. 22, 245 A.2d 98 (1968); State v. Stamey, 3 N.C. App. 200, 164 S.E.2d 547 (1968).

[28]United States v. Valez, 431 F.2d 622 (8th Cir. 1970); United States v. Butler, 426 F.2d 1275 (1st Cir. 1970); United States v. Marson, 408 F.2d 644 (4th Cir. 1968), *cert. denied*, 394 U.S. 1056 (1969); United States v. Quarles, 387 F.2d 551 (4th Cir. 1967), *cert. denied*, 391 U.S. 922 (1969).

[29]United States v. Ash, 461 F.2d 92 (D.C. Cir. 1972), *rev'd*, 413 U.S. 300 (1973); United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970), *overruled by* United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738, *cert. denied*, 400 U.S. 919 (1970).

[30]390 U.S. 377 (1968). *See also* Williamson v. State, 248 So. 2d 634 (Miss. 1971).

[31]390 U.S. at 384. The Court appears to have adopted the "totality of the circumstances" test of *Stovall*.

[32]See cases cited *supra* note 27.

[33]461 F.2d 92 (D.C. Cir. 1972). In *Ash* witnesses were shown photographs of five individuals, including defendant. Defendant's counsel was not present at this identification confrontation and for that reason the court held that defendant's sixth amendment rights had been violated.

[34]United States v. Ash, 413 U.S. 300 at n.2 (1973), *citing* Reed v. Anderson, 461 F.2d

(1) it showed that there was some difference of opinion on whether the right to counsel should be extended to photographic lineups; and (2) it got the question before the Supreme Court via writ of certiorari.

Upon hearing the case the Supreme Court adopted the majority view that the right to counsel does not extend to photographic lineups,[35] thus settling the question for the time being. However, even this decision reflects the lack of total agreement in the area since there was a strong dissenting opinion written by Justice Brennan in which Justice Douglas and Justice Marshall joined.[36]

C. *The Role of Counsel*

Since it has been established that under certain circumstances one is entitled to the presence of counsel at pretrial identification confrontations,[37] it would be worthwhile to explore the role of counsel at such confrontations. Since the pretrial identification confrontation is so important, it is in the suspect's best interest that he be adequately represented prior to trial. For counsel to be truly adequate at such confrontations he must do more than make a token appearance. He must actively begin his representation of the suspect as if the suspect's entire case depended solely on the results of the confrontation, for often the entire case does depend on the confrontation.[38] There are numerous things counsel can do to guard the rights of his client. When the confrontation is still in the planning stage, counsel can point out possible deficiencies and thereby prevent prejudice. For this reason counsel, when contacted, should ask that he be allowed to be present when the confrontation is planned. Counsel should, after participating in the planning or after making a diligent effort to participate, arrive at least 1 hour prior to the confrontation to talk with his client and to inform him as to what will take place and what will be expected of him. Also at this time counsel should make last-minute efforts to alleviate any deficiencies *prior* to the confrontation. If counsel is unable to prevent the prejudice or if some-

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739 (3d Cir. 1972) (*en banc*); United States v. Long, 449 F.2d 288 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); United States v. Serio, 440 F.2d 827 (6th Cir. 1971); Allen v. Rhay, 431 F.2d 1160 (9th Cir. 1970); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Collins, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1969); United States v. Robinson, 406 F.2d 64 (7th Cir. 1969), *cert. denied*, 395 U.S. 926 (1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

[35]United States v. Ash, 413 U.S. 300 (1973).

[36]*Id.* at 326 (dissenting opinion).

[37]*See, e.g.*, Kirby v. Illinois, 406 U.S. 682 (1972); Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

[38]*See* United States v. Wade, 388 U.S. 218, 229 (1967), *citing* Williams & Hammelmann, *supra* note 2, at 482; *accord*, TIME, *supra* note 2, at 59.

thing prejudicial occurs which is unexpected, then counsel should make extensive notes of the prejudicial elements and bring them out at the trial. Even though the suspect also observes the prejudicial treatment he might be less able to convey the total picture to the jury than would the trained attorney with accurate notes.[39] Further, if the accused has a criminal record he would be gambling by taking the stand since there would be a great possibility that the opposing attorney would force the accused to admit to the prior convictions within the hearing of the jury.[40] Additionally, the suspect would probably not be as readily believed as would his counsel.[41] Counsel could even go so far as to cross-examine the identifying witness at the confrontation. In essence, since one's attorney is to function as one's spokesman in court, he should be fully prepared to serve in that capacity by recognizing possibilities of prejudice at the confrontation.[42]

It should be noted that legal representation at pretrial confrontations may have adverse results. By objecting to questions asked of certain participants counsel might point out the accused to the witnesses, thereby focusing undue attention on the man he is representing.[43] This disadvantage is present, however, only where there is more than one confrontation participant. If the confrontation is on a one-to-one basis (a witness viewing only one person rather than a group of persons), then the disadvantage is no longer present. Since there is only one person to choose, the presence of that person's counsel would not focus further attention on the suspect.

III. The Privilege Against Self-Incrimination

The Fifth Amendment of the Constitution of the United States provides in part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[44] This privilege not only allows one who has been accused of a crime to refuse to answer questions concerning his involvement in the crime, but further enables him to refuse to testify at his own trial.[45] Is is known that the privilege applies at the trial itself, but in recent years controversy has arisen concerning application of the doctrine outside the courtroom. Since *Miranda v. Arizona*,[46] the courts have held that if a person being interro-

[39]*See* Note, 28 La. L. Rev. 259, 262 (1968).
[40]*Id.*
[41]*Id.*
[42]For specific areas that counsel should explore see section VI *infra.*
[43]Note, 32 Albany L. Rev. 198, 206 (1967).
[44]U.S. Const. amend. V.
[45]McCormick, Handbook of the Law of Evidence 272 (2d ed. 1972).
[46]384 U.S. 436 (1966).

gated indicates that he wishes to remain silent the interrogation must be terminated.[47] Therefore, it appears that a suspect has a right to refuse to supply information not only prior to trial, but even prior to the initiation of the "formal criminal process."[48] Problems arise not only concerning when the privilege attaches, but also what activities are covered by the privilege; *i.e.*, is the privilege limited to evidence that can be obtained from a conversation with the accused, or does the privilege extend to anything the accused could do that might possibly link him to the crime? For instance, the Supreme Court has addressed at least two cases in which defendants have alleged that their privilege against self-incrimination had been violated during the identification process. In one case, *Holt v. United States*,[49] the defendant was required to try on a blouse that was connected to the crime being investigated, and in the other case, *Schmerber v. California*,[50] the defendant was required to allow a blood sample to be withdrawn from his body. In both cases the Court held that the privilege had not been violated. These two cases are important because they went further than merely stating that the accused's privilege against self-incrimination had not been violated; they established a guideline as to what activities are protected by the privilege. The Court in *Schmerber* stated, "[T]he privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . ."[51] The Court further stated that "compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate the privilege."[52]

It was in this light that the Supreme Court in *United States v. Wade* considered the question of whether participation by an accused in an identification confrontation violated the accused's privilege against self-incrimination. The Court, relying on *Holt* and *Schmerber*, held that the exhibition of one's person at an identification confrontation did not involve compulsion to give testimonial evidence.[53] Therefore, it appears that participation in an identification confrontation has been categorized—at least for the time being—as physical evidence and, therefore, not within the protection of the privilege against self-incrimination. For this reason it is apparent that attacking an identification confrontation on a self-incrimination ground would be futile.

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[47] *Id.* at 444-45.
[48] McCORMICK, *supra* note 45, at 274.
[49] 218 U.S. 245 (1910).
[50] 384 U.S. 757 (1966).
[51] *Id.* at 761.
[52] *Id.* at 764.
[53] 388 U.S. at 222.

Such a broad statement, however, must be limited to *participation* in an identification confrontation. It is still quite possible that specific events could occur during the confrontation that would give rise to an assertion of the privilege; *e.g.*, if the accused were asked to make incriminating statements.[54]

IV. Specific Elements Affecting the Fairness of the Confrontation

A. Generally

Since a pretrial identification confrontation must meet the due process standards of fundamental fairness,[55] it would be beneficial to explore certain elements common to identification confrontations which might render the pretrial identification inadmissible. The test of due process prior to the *Wade-Gilbert-Stovall* trilogy was whether the procedures employed offended fundamental standards of "decency, fairness, and justice."[56] This is still the test but has now been enlarged to include the right to the presence of counsel at the lineup.[57] As stated in *Stovall*,[58] one must consider the "totality of the circumstances" surrounding the lineup to determine whether the lineup exceeds the bounds of fundamental fairness. Since there are certain elements common to identification confrontations which may increase the possibility of misidentification or cause undue attention to be focused upon a certain participant,[59] the next portion of this comment will be dedicated to the exploration of specific aspects of the identification confrontation and the extent to which these aspects affect the fairness of the confrontation.

B. Clothing

In our society clothing is very important not only for its utility in protecting us from the elements, but also because of our society's style-conscious attitudes. As a result of the important position accorded clothing, individuals are often inclined to notice what another person is

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[54]Interrogation must be distinguished from mere voice identification. See section IV B *infra*.

[55]United States v. Wilkerson, 453 F.2d 657 (8th Cir. 1971).

[56]Rochin v. California, 342 U.S. 165 (1952).

[57]State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

[58]388 U.S. at 302.

[59]Claims have been made in various cases that specific aspects of identification confrontations were so prejudicial as to render the confrontation as a whole prejudicial. *See, e.g.*, Roper v. Beto, 454 F.2d 499 (5th Cir. 1971) (compelled recitation claimed to be prejudicial); United States v. Collins, 416 F.2d 696 (4th Cir. 1969) (clothing claimed to be prejudicial); People v. Hogan, 70 Cal. Rptr. 448 (1968) (contrasting race of participants claimed to be prejudicial); Commonwealth v. Lee, 215 Pa. Super. 240, 257 A.2d 326 (1969) (police remarks at the confrontation claimed to be prejudicial).

wearing before noticing the physical features of the person. As a result it is easy for us to distinguish persons according to the clothes they are wearing and at times to identify a person solely on the basis of his clothing. Because of this, clothing can directly affect the fairness of an identification confrontation. It is common for the person identified at the confrontation to claim that his clothing was so distinctive that it made him stand out from the other participants and, therefore, was the primary factor leading to the identification.[60] Clearly, distinctive clothing could easily prejudice an otherwise fair identification confrontation. For this reason the identifying witness should be forced to base his identification primarily on the participant's person, not merely on his clothing. On the other hand, since the suspect's clothing often forms an integral part of the description, clothing cannot be totally discounted.

Several different problems may arise with regard to clothing of the participants. One such problem arises when one participant wears clothing which differs from that of the other participants. It would appear that if five persons were dressed in white and one person in red, attention would immediately be focused on the person in red regardless of the similarity between him and the description given to the police. In some cases the fact that the person identified wore clothing different from other participants has been held to be at least a factor in holding the identification procedure prejudicial.[61] The majority view, however, has been succinctly stated as follows: "[T]he police are not required to stage a masquerade by dressing all men in the lineup in similar attaire [*sic*]."[62]

In *United States v. Collins*[63] a lineup was conducted in which defendant and five un-uniformed policemen participated. Defendant wore a light blue shirt and shiny black pants as contrasted to the conventional white shirts and trousers of the others. This confrontation was held not to be prejudicial. The *Collins* case, however, should not be interpreted as allowing police to dress participants in any manner they wish. If such a confrontation contained other prejudicial elements it would appear that the distinctive attire involved in this case would contribute to an

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[60]*See, e.g.*, United States v. Collins, 416 F.2d 696 (4th Cir. 1969); United States v. Ball, 381 F.2d 702 (6th Cir. 1967), *cert. denied*, 390 U.S. 962 (1968); United States *ex rel.* Geralds v. Deegan, 292 F. Supp. 968 (S.D.N.Y. 1968); Bradley v. Commonwealth, 439 S.W.2d 61 (Ky. 1969); State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

[61]Foster v. California, 394 U.S. 440 (1969); People v. Kincy, 72 Ill. App. 2d 419, 219 N.E.2d (1966).

[62]3 J. WIGMORE, EVIDENCE § 786a (B)(2), comments (3d ed. 1940). *See also* Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970), where it is stated: "Some latitude must be allowed to the police, at least in the absence of deliberate theatrics." *Id.* at 1352.

[63]416 F.2d 696 (4th Cir. 1969); *accord*, Monteiro v. Picard, 443 F.2d 311 (1st Cir. 1971).

overall finding of suggestiveness as judged by the totality of the circumstances. What can be drawn from *Collins* is that the failure of police to dress all participants similarly, without more, does not violate any constitutional mandates.

Another problem arises when a suspect is required to wear an article of clothing which was mentioned in the initial description given to the police by the witness. The majority view appears to hold that a suspect may be required to try on certain clothing in aid of identification.[64] This procedure is often attacked either as a denial of due process or as a violation of the privilege against self-incrimination,[65] but neither avenue of attack has been overly successful. In dealing with specific cases the courts have found that due process has not been denied by requiring a suspect, over the suspect's objection, to wear a black jacket at the confrontation,[66] to wear a hat and a coat described by the identifying witness,[67] to don a pork pie hat,[68] or to put on a jacket worn by one of the other participants.[69] Even though the confrontations in the aforementioned cases were not held prejudicial, caution should be exercised in order to avoid focusing undue attention on a single suspect, especially if only one of the participants is required to don the article of clothing. A better procedure would be to require *all* of the participants to wear identical articles of clothing not related to the crime. Another alternative would be to require each participant, one at a time, to wear the article of clothing delineated by the witness' initial description.[70] A third appropriate procedure would be to dress all participants in the mode of dress described by the identifying witness. This procedure, although not compelled,[71] has been upheld by the courts[72] and certainly appears to be

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[64]Holt v. United States, 218 U.S. 245 (1910); Orr v. State, 236 Ala. 462, 183 So. 445 (1938); People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), *cert. denied*, 375 U.S. 994 (1964).

[65]Holt v. United States, 218 U.S. 245 (1910), held that requiring a suspect to try on a blouse did not violate the suspect's privilege against self-incrimination. *Accord*, Crenshaw v. State, 225 Ala. 346, 142 So. 669 (1932); Vigil v. People, 134 Colo. 126, 300 P.2d 545 (1956); Boyers v. State, 198 Ga. 838, 33 S.E.2d 251 (1945). *See also* 8 J. WIGMORE, EVIDENCE § 2265, at 387, 394 (McNaughton rev. 1961).

[66]United States v. Ball, 381 F.2d 702 (6th Cir. 1967), *cert. denied*, 390 U.S. 962 (1968).

[67]Bradley v. Commonwealth, 439 S.W.2d 61 (Ky. 1969).

[68]United States *ex rel.* Geralds v. Deegan, 292 F. Supp. 968 (S.D.N.Y. 1968).

[69]State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

[70]United States v. Wilkerson, 453 F.2d 657 (8th Cir. 1971), *cert. denied*, 405 U.S. 1071 (1972); United States v. Beard, 381 F.2d 325 (6th Cir. 1967). *But see* Martinez v. Turner, 461 F.2d 261 (10th Cir. 1972), where defendant and other participants were required to try on a trench coat. The court found that since defendant was shorter than the others in the lineup, this procedure tended to focus undue attention on defendant because the coat fit him alone.

[71]Police are not required to stage a masquerade. See note 62 *supra*.

[72]United States v. Anderson, 406 F.2d 719 (4th Cir. 1969), *cert. denied*, 395 U.S. 967 (1969).

a better procedure than requiring only one participant to wear a certain article of clothing. By employing one of these three procedures as a substitute for dressing one participant distinctively, attention is not unduly focused on any one participant and the police are more nearly assured of getting an identification of the *person* rather than merely an identification of clothing. Distinctive clothing, however, is not as prejudicial if the suspect is shown wearing the clothes he was wearing at the time of his arrest, especially if the lineup is conducted within a relatively short time after the alleged crime.[73] The logic behind this proposition is that the suspect is wearing clothing which *he* chose to wear rather than clothing assigned to him by the police. In any event, since a suspect's freedom is at stake, he should be granted the privilege of being identified on the basis of his physical characteristics rather than on the contents of the closet at the police station.[74]

C. Compelled Recitation

In many cases an eyewitness or victim of a crime has the opportunity to hear the perpetrator of the crime talk. Thereafter, when the eyewitness describes the perpetrator of the crime, the eyewitness will often mention the fact that he heard the perpetrator speak. Subsequently, in an effort to secure a complete and accurate identification the police will require one, some, or all of the confrontation participants to speak while in the presence of the identifying witness.[75] On its face this procedure would appear to be both a logical and a fair means of securing an accurate identification of the actual perpetrator of the crime. Quite often, however, the person identified will attack the procedure of compelled recitation as being unfair. The courts, however, have not held compelled recitation to be a per se violation of due process, but instead merely a factor to be considered in assessing the overall fairness of the confrontation.[76] Moreover, in most cases compelled recitation has been upheld as a perfectly acceptable component of the identification procedure.[77] There are instances, however, in which compelled recitation may

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[73]Hernandez v. State, 7 Md. App. 355, 255 A.2d 449 (1969); Presley v. State, 224 Md. App. 550, 168 A.2d 510 (1961), *cert. denied*, 368 U.S. 957 (1962).

[74]When clothing occupies a place of high priority in the witness' description, a way to test the accuracy of the identifying witness would be to dress a police officer or some other person who could not have been involved in the crime in clothing similar to that described. If the witness identifies the masquerading officer, it would be obvious that the witness was relying on clothing rather than physical characteristics to make the identification—and the credibility of the witness would consequently be placed in doubt.

[75]For a discussion of the consequences arising when a confrontation participant refuses to speak, *see* People v. Ellis, 55 Cal. Rptr. 385, 421 P.2d 393 (1966).

[76]Roper v. Beto, 454 F.2d 499 (5th Cir. 1971).

[77]United States v. Beard, 381 F.2d 325 (6th Cir. 1967); Annot., 39 A.L.R.3d 487 (1971).

easily lead to prejudice. For instance, if only one of the participants is required to speak, the witness' attention will automatically be focused upon that participant to the exclusion of the others. Therefore, in order to avoid prejudice, if one participant is required to speak then all should be required to do so.[78]

A somewhat different problem arises when an identification is based upon voice recognition alone, rather than upon the totality of personal characteristics possessed by the participant. In *Palmer v. Peyton*[79] the identifying witness was placed in one room and the suspect in an adjoining room where the suspect, out of view of the witness, was required to speak. Upon this compelled recitation alone the suspect was identified. The Fourth Circuit Court of Appeals held that such a procedure was highly prejudicial and refused to uphold the identification since it was based solely on the suspect's voice.[80] From this case it appears, and logically so, that the proper role of voice identification is to serve as a component of the overall identification rather than as the sole basis of identification.[81]

The practice of compelling confrontation participants to speak while in the presence of a witness has also been attacked as a violation of the privilege against self-incrimination. The suspect usually claims that being compelled to utter certain words is the equivalent of being compelled to give evidence against one's self.[82] The courts, however, have generally refused to apply the privilege against self-incrimination to compelled recitation at an identification confrontation.[83] The privi-

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But see United States v. Wade, 388 U.S. 218, 260 (1967) (dissenting opinion).

[78]Crume v. Beto, 383 F.2d 36 (5th Cir. 1967), *cert. denied*, 395 U.S. 964 (1969). However, in this case even though the court condemned the practice of singling out one participant by requiring him to speak rather than requiring all participants to speak, the court upheld the identification of the sole participant who was required to speak. The court justified its decision on the grounds that the witness had already tentatively identified the participant, and it was only *after* this tentative identification that the participant was required to speak.

[79]359 F.2d 199 (4th Cir. 1966).

[80]*Id.* at 201.

[81]For cases in which the court stated that the identification was based on the overall characteristics of the suspect rather than on the suspect's voice alone, *see* State v. Hill, 193 Kan. 512, 394 P.2d 106 (1964); State v. Carcerano, 238 Ore. 208, 390 P.2d 923 (1964), *cert. denied*, 380 U.S. 923 (1965).

[82]This claim is to be distinguished from claims where the suspect attacks the whole identification process as a violation of the self-incrimination privilege. The material referred to in this section involves the more limited area of compelled recitation. Compare the compelled recitation area with text accompanying notes 44 through 54.

[83]United States v. Wade, 388 U.S. 218, 223-24 (1967). *But see* Note, 32 ALBANY L. REV. 198 (1967), which states:

> Speaking requires a volitional act on the part of accused. Unlike fingerprints or blood which can be extracted from accused against his will, speaking in order

lege has generally been limited to situations where a person is compelled to give evidence of a testimonial nature against himself and has not been extended to situations where the person is merely required to speak for purposes of identification.[84] The Circuit Court of Appeals for the District of Columbia in *Wise v. United States*[85] aptly distinguished self-incrimination from mere identification by stating:

> [T]here is a decisive difference between testimony as to utterances by voice that relates to the meaning of what was said, and testimony based on physical qualities—such as timbre, pitch, intonation and speech pattern—which permit identification of the speaker. Voice identification is not the testimonial evidence embraced by the privilege against self-incrimination.[86]

Therefore, it appears that voice identification may be categorized as "real or physical evidence"[87] and thus distinguished from evidence of "communications or testimony of the accused"[88] which is protected by the privilege against self-incrimination. But one should not interpret the preceding as an unequivocal declaration that all statements made at an identification confrontation will be considered "real or physical evidence."[89] The *Wade* case was the first time the Supreme Court was squarely faced with the self-incrimination issue of compelled recitation at an identification confrontation,[90] but the question of what utterances would be considered "real or physical evidence" was left unanswered.[91]

One of the instances where there exists doubt whether one's privilege against self-incrimination has been violated is where a participant is compelled to recite the *exact* words alleged to have been uttered by the perpetrator of the crime. In *State v. Taylor*[92] the South Carolina Supreme Court held that requiring the accused to repeat the exact words used by the perpetrator of the crime was the equivalent of requiring the accused to partially reenact the scene of the crime and was

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to be subjected to analysis first requires exercise of an accused's will. Volitional acts which can directly connect an accused with a crime should come within the protection of the fifth amendment.

Id. at 207.

[84]Schmerber v. California, 384 U.S. 757 (1966).

[85]383 F.2d 206 (D.C. Cir. 1967).

[86]*Id.* at 208; *accord*, 8 J. WIGMORE, EVIDENCE § 2265, AT 386 (MCNAUGHTON REV. 1961).

[87]PEOPLE V. ELLIS, 55 CAL. RPTR. 385, 421 P.2d 393, 395 (1966).

[88]*Id.* at 394; *accord*, People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), *cert. denied*, 375 U.S. 994 (1964); 8 J. WIGMORE, *supra* note 86, at 395-96.

[89]14 LOYOLA L. REV. 222, 227-28 (1967-68).

[90]32 ALBANY L. REV. 198 (1967).

[91]14 LOYOLA L. REV., *supra* note 89.

[92]213 S.C. 330, 334, 49 S.E.2d 289, 292 (1948).

therefore inadmissible.[93] Perhaps such a holding was reached because the court felt that the exact words would lead to an emotional response by the victim and thus possibly cause misidentification.[94] Other courts, however, have held that requiring the accused to repeat the exact words uttered by the perpetrator of the crime does not violate the privilege against self-incrimination.[95] Today, if a court were faced with a case where the accused was compelled to repeat the exact words uttered by the perpetrator of the crime, it is highly probable that the court would not find a violation of the privilege against self-incrimination. Notwithstanding this high probability, if voice identification is desired, it would be preferable to require the participants to voice some innocuous phrase rather than the exact words.

D. Police Remarks

Not only can utterances of a suspect lead to prejudice, but so also can utterances of the police. By conversing with the witness who is viewing the confrontation the police may focus attention, either intentionally or unintentionally, upon a certain participant.[96] One can hardly imagine anything more prejudicial than allowing the officer in charge to tell the witness that the third man is the one who is thought to have committed the crime. Morever, there is not much need for a lineup if it is conducted in such a manner. Therefore, such a direct statement by the police should be absolutely prohibited. The police, however, can affect the confrontation through use of more subtle statements. At times an overzealous officer may prompt a witness to make an identification. In order to accomplish this, the officer may attempt to impose upon the wwitness a feeling of moral obligation to make an identification. As a result, a witness who is unsure whether the perpetrator of the crime is present may allow the police pressure to persuade him to make an identification. Thus, an unsure witness prior to trial has become sure. By the time of the trial it is likely that the witness will have no doubts as to the identity of the perpetrator of the crime.[97] In *Hernandez v. State*[98] the Maryland Supreme Court upheld an identification, but in so doing stated that it felt that it was improper for the police to pressure a witness by telling the witness that it would be unfair if he failed to make a positive identification.[99] In *Commonwealth v. Lee*,[100] when a witness

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[93]*Id.* at 292.

[94]Murray, *The Criminal Lineup at Home and Abroad*, 10 UTAH L. REV. 610, 613 (1966).

[95]*E.g.*, United States *ex rel.* Bennett v. Myers, 381 F.2d 814 (3d Cir. 1967), *cert. denied*, 390 U.S. 973, *rehearing denied*, 390 U.S. 1046 (1968).

[96]*See, e.g.*, Commonwealth v. Lee, 215 Pa. Super. 240, 257 A.2d 326 (1969).

[97]United States v. Wade, 388 U.S. 218, 224 (1967).

[98]7 Md. App. 355, 255 A.2d 449 (1969).

[99]*Id.* at 454.

was unable to make an identification at the first lineup, the police showed him the getaway car and informed him that the persons in the lineup had been arrested while in the car. The witness immediately recognized the car and at a second lineup identified two of the participants. The court found such procedure to be unnecessarily suggestive. In the Mississippi case of *Poole v. State*[101] a witness was informed that the initial description she had given the police fit that of John Crawford Poole. Her subsequent in-court identification of Poole was upheld[102] without the court addressing the question whether the police remarks were prejudicial. It is regrettable that the court failed to deal with this aspect of the case, for under the circumstances it is hard to imagine a more prejudicial statement. Statements such as the one made in the *Poole* case should be absolutely forbidden, for they have the effect of directly linking a suspect to a crime before the suspect is even confronted by the identifying witness.

All police statements to the identifying witness, however, are not prejudicial.[103] In fact, sometimes it is almost necessary to inform an identifying witness that a suspect is in custody in order to ensure the witness' presence at the station and thereby guarantee a quick identification.[104] Realistically speaking, anytime a person is asked to observe an array of suspects it is implied that the police have in custody the person whom they believe to be the perpetrator of the crime.[105] Only when the police go further than merely informing the witness that they have a suspect in custody should their conduct be prohibited. Any further remark would be unnecessary and probably prejudicial.

E. Race

Since the optimum identification confrontation is composed of several participants, the initial reaction of a witness will probably be an observation of the outstanding characteristics of each participant; *i.e.*, those things which stand out even at a moment's glance. The race of each participant is unfortunately one such characteristic. Whereas only the most observant witness would recognize the difference in eye color among the participants, almost anyone would immediately observe any

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[100]215 Pa. Super. 240, 257 A.2d 326 (1969).

[101]216 So. 2d 425 (Miss. 1968).

[102]The identification was upheld on the basis of the independent source doctrine. *Id.* at 427. Poole was not represented by counsel, and this was the issue discussed by the court.

[103]In many instances police statements made prior to the confrontation have been allowed. *See, e.g.*, People v. Williams, 117 Ill. App. 2d 34, 254 N.E.2d 81 (1969); People v. Logan, 25 N.Y.2d 184, 250 N.E.2d 454, 303 N.Y.S.2d 353 (1969).

[104]Bratten v. State, 307 F. Supp. 643 (D.C. Del. 1969).

[105]People v. McIntosh, 82 Ill. App. 2d 90, 227 N.E.2d 76 (1967).

difference in race. Therefore, it is clear that the overall fairness of the confrontation can be greatly affected by the selection of participants, especially if the participants selected vary as to race. Further, since in most instances the police will have persons available who are of the same race as the suspect and since police selection of persons of varying races can have a devastating effect on the overall fairness of the confrontation, it would appear that the police should be *required* to select persons of the same race to participate in the confrontation. The courts have not been altogether consistent on this point. In *People v. Hogan*[106] the identifying witness described a burglar as a Negro. Subsequently, the witness viewed a lineup composed of a Negro, a Mexican, and two Caucasians. The court held that the "contrasting composition" of the lineup rendered the identification inadmissible. Other cases[107] have reached a similar holding. A lineup in which some of the participants are not of the same race as that mentioned by the witness has the same effect as a lineup with fewer participants since those of a different race are summarily discounted as possible suspects. In most cases the police would not be unduly burdened if they were required to make their best efforts to construct a lineup of persons of the same race, and certainly there would be less prejudice as a result of these efforts. The courts, however, have not generally adopted such a position, and in many cases identification confrontations have been upheld even though the confrontations were composed of persons of different races.[108]

F. The Single-Man Lineup

Another feature of identification confrontations that can result in prejudice is to display the suspect alone to the witness. If the witness is confronted with only one person, a mistaken identification may easily result for two reasons: (1) the witness has no one with whom to compare the suspect; and (2) the exhibition of only one person is the equivalent of the police telling the witness, "Here is the man we believe to be guilty." Although the single-man lineup has been upheld by the courts as a valid means of identification,[109] discretion should be exercised and

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[106]70 Cal. Rptr. 448 (1968).

[107]*See* Bowman v. State, 44 Ala. App. 331, 208 So. 2d 241 (1968); People v. Noisey, 265 Cal. App. 2d 543, 71 Cal. Rptr. 339 (1968); People v. White, 116 Ill. App. 2d 180, 253 N.E.2d 654 (1969); State v. LeVier, 202 Kan. 544, 451 P.2d 142 (1969).

[108]For example, in People v. Brown, 20 N.Y.2d 238, 229 N.E.2d 192, 282 N.Y.S.2d 497, *remittitur amended*, 20 N.Y.2d 801, 231 N.E.2d 132, 284 N.Y.S.2d 457, *cert. denied*, 390 U.S. 928 (1967), an identification confrontation was conducted consisting of three participants, two blacks and one white. The court considered the question of race and determined that the fact that persons of different races participated did not affect the fairness of the confrontation.

[109]*See, e.g.*, Stovall v. Denno, 388 U.S. 293, 302 (1967); Davis v. State, 255 So. 2d 916

the single-man lineup used only when absolutely necessary. Actually, the only time when a single-man lineup is truly justified is when the identification confrontation is conducted soon after the crime. This justification appears to be based on the theory that an immediate identification will more likely be accurate than an identification occurring after a lapse of time.[110] To a certain extent this is understandable since the purpose of the confrontation is to secure an accurate identification from a reliable witness.[111] But one must question the reliability of a witness who can not retain the memory of a criminal's identity long enough to allow implementation of a full-scale corporeal lineup.

Therefore, where a single-man lineup is conducted, one should determine if it is really necessary. One should balance the value of immediacy against the possibility of prejudice. It would appear that the longer the suspect has been in custody and the greater the time period since the crime, the less justified is the single-man lineup. Since immediacy serves both the witness (memory is fresher) and the suspect (if not identified there may be no reason to hold the suspect), where proper in view of other circumstances, the suspect could be given the option of participating in an immediate one-man lineup or in a later full-scale lineup. This would strengthen one prong of the two-prong justification for the immediacy of single-man lineup, for it would allow the suspect to weigh the value of prejudice inherent in the single-man lineup against the value of a quick release. The suspect could, in essence, say, "I'll forego the pleasure of immediate release."

In any event, the fact that only one person is shown to the witness is a factor that weighs against admission of the identification. This factor alone usually will not be considered so prejudicial as to render the identification inadmissible.[112] Where other prejudicial elements are also present, however, the totality of the elements may be sufficient to taint the entire confrontation.

V. The Independent Source Doctrine

Possibly the most important principle having application to the area of pretrial identification confrontation is the independent source

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(Miss. 1971); Poole v. State, 216 So. 2d 425 (Miss. 1968); Short v. State, 211 So. 2d 545 (Miss. 1968).

> The practice of showing suspects singly to persons for the purpose of identification, and not as a part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . . .

388 U.S. at 302.

[110]*See* Stovall v. Denno, 388 U.S. 293 (1967).

[111]*Id.* at 302.

[112]See cases cited note 109 *supra*.

doctrine. Although much ado has been made about the extension of the right to counsel at post-indictment confrontations, the right to counsel is actually severely limited by the phrase "post-indictment." Further, the fact that counsel is not present at a post-indictment confrontation may, in effect, be overridden by the independent source doctrine.[113] Essentially this doctrine states that regardless of how prejudicial the circumstances surrounding the confrontation were, if it can be shown that the witness' identification of the suspect is based on a source independent of the confrontation, then any in-court identification is admissible. The independent source doctrine probably originated in *Wong Sun v. United States.*[114] The doctrine was then adopted and specifically applied to the identification confrontation area by the Supreme Court when it decided *Wade.*[115] The *Wade* Court stated that certain factors should be considered in determining whether the independent source doctrine should be applied to an identification confrontation, such as:

> the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to the lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.[116]

These tests have also been approved by lower courts.[117]

The independent source doctrine is an all-powerful legal precept and has been used to overcome almost any deficiency that exists at an identification confrontation—even the absence of counsel.[118] Therefore, if a source independent of a pretrial identification confrontation can be shown to be the actual source of identification, it does not matter how

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[113]United States v. Wade, 388 U.S. 218 (1967); Stewart v. State, 487 P.2d 371 (Colo. 1971); Poole v. State, 216 So. 2d 425 (Miss. 1968).

[114]371 U.S. 471 (1963). "[T]he more apt question in such a case is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has been obtained by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 488, *quoting* J. MAGUIRE, EVIDENCE OF GUILT 221 (1959).

[115]388 U.S. at 241.

[116]*Id.* When the court is faced with a case in which an in-court identification may or may not be based on an independent source, the trial judge should conduct a hearing out of the presence of the jury to determine whether the in-court identification was obtained by a prejudicial confrontation or based on a source independent of the confrontation. Stewart v. People, 487 P.2d 371 (Colo. 1971); People v. Edmonds, 32 Mich. App. 172, 188 N.W.2d 205 (1971); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); State v. Singleton, 187 S.E.2d 518 (S.C. 1972).

[117]Baylor v. State, 246 So. 2d 516 (Miss. 1971); Poole v. State, 216 So. 2d 425 (Miss. 1968).

[118]See cases cited note 116 *supra.*

prejudicial the confrontation was. In actuality, therefore, there are no absolute guarantees of fairness at a pretrial identification confrontation, since any infirmity can be overcome by the independent source doctrine. The power of this doctrine can easily lend itself to abuse by overambitious police officers. For example, if the police are aware of the doctrine and feel that they can establish an independent source for the identification, then they might be tempted to conduct an extremely prejudicial confrontation in order to reinforce the witness' identification of the suspect and thereby more nearly guarantee conviction. The doctrine, however, regardless of its all-powerful status, serves a valuable function. If, in fact, the witness' identification is based upon his confrontation with the perpetrator—during the conduct of the crime, not the lineup— then it is to society's benefit for that person to identify the perpetrator. An eyewitness identification is important in a court of law and should not be excluded except for very good reason. The mere fact that a questionable confrontation has occurred should not negate a bona fide identification of the perpetrator of the crime. The danger arises when the original confrontation does not cause a detailed description of the perpetrator to register in the witness' mind. If this nebulous impression is followed by a prejudicial identification confrontation, there is a chance that attention will be so focused on a single suspect that an identification of anyone else would be highly improbable. By the time of trial the original and primary confrontation (at the scene of the crime) will have become only a hazy memory, whereas the more recent confrontation will have become firmly established in the mind of the witness.

Ideally, the occasion for application of the independent source doctrine should never arise, since the only time the doctrine comes into play is after a questionable confrontation. If the confrontation is in danger of being held inadmissible, then the prosecution must be prepared to show that the identification of the suspect is based on something other than the confrontation. It would be too idealistic to believe that the time will arrive when the independent source doctrine will vanish for lack of use, but if care is taken by the police to construct fair confrontations, use of the doctrine in this area of criminal law could be significantly reduced.

VI. Suggestions

It has already been established that the pretrial identification confrontation may at times have the effect of determining guilt of a suspect prior to the trial.[119] It has also been established that these confrontations are prone to abuse, whether intentional or unintentional. Therefore,

[119]See note 2 *supra.*

because of the importance of the confrontation and the ease with which such confrontations can be prejudiced, it would be beneficial if detailed guidelines could be established to govern pretrial identification confrontations. Moreover, when one considers the immense potential for abuse it is remarkable that guidelines have not already been established. The judiciary has shown a willingness to regulate this area by extending the right to counsel to post-indictment confrontations. Although this was wise, it simply does not go far enough. The real solution to problems at identification confrontations lies in the establishment of comprehensive guidelines. These guidelines would be beneficial to confrontation participants since adherence to the guidelines would guarantee a less prejudicial confrontation. The guidelines would also benefit the police. By establishing uniform guidelines and educating officers as to the demands of the guidelines, law enforcement agencies would be given a system which, if followed, would guarantee admissibility of an identification made at the confrontation. These guidelines would aid the courts by providing a method of determining admissibility prior to the trial, thus simplifying and reducing the role of the trial court.

It would be unrealistic to suggest that a set of guidelines could be drafted that would apply to *every* identification confrontation; however, it would not be unrealistic to require that exigent circumstances be shown before deviation from the guidelines would be allowed.

In the remaining portion of this comment certain procedures will be suggested that could standardize identification confrontations and decrease prejudice. The procedures to be suggested could serve as the nucleus for a comprehensive set of guidelines.

First, in cases where an initial description is given by the witness to the police, the description should be written down by the police and made available to the court and defendant's counsel. Moreover, to simplify the procedure and guarantee that all relevant details are discovered, a standardized form could be provided which would include, among other things, questions concerning whether the witness viewed the perpetrator of the crime in the daylight or at night, length of time viewed, distance from which the witness viewed the crime, and other relevant questions concerning the witness' initial encounter with the perpetrator of the crime. The information provided by the form could then be compared to the actual description of the suspect and thereby serve as a tool to determine whether the independent source doctrine should be applied.[120] Of course, any question as to applicability of the

[120] *See* United States v. Wade, 388 U.S. 218, at 241. One of the factors suggested in *Wade* to be used in determining whether the independent source doctrine should be applied is "the existence of any discrepancy between any pre-lineup description and the defendant's actual description . . . .".

independent source doctrine would not arise unless the identification confrontation were defective.

At the identification confrontation the police should always provide the suspect with an attorney. Even though the presence of counsel is not required at pre-indictment confrontations[121] or photographic lineups,[122] counsel should be provided anyway unless immediacy is of utmost importance. The suspect should be given the opportunity to contact his own attorney. If his own attorney cannot be reached the public defender should be contacted or an attorney appointed.[123]

In all cases where it is possible, a corporeal lineup rather than a showup or a photographic lineup should be conducted with at least six persons participating. Six is an arbitrary number but is sufficiently large to guarantee a basis for comparison and not so large as to cause confusion. The suspect should be allowed to pick the persons with whom he will participate[124] and should be allowed to pick his position in the lineup.[125] Police officers should not be allowed to participate.[126] It is quite possible that the officer would know which of the participants is the prime suspect and, either intentionally or unintentionally, focus attention on the suspect.[127] The participants should be dressed in such a manner that attention is not unduly focused on any one participant. This does not require the police to conduct a masquerade but merely requires the exercise of sound judgment. For instance, if one participant is dressed in prison garb then all should be. The police should make sure the witness does not see any of the participants prior to the confrontation. Also, never more than one witness should view the lineup at a time, for if there are more, a single witness who is only partly sure of his identification could, by making that identification in the presence of other witnesses, erase doubts the others might have and thus lead to spontaneous identification. Moreover, not only should the witnesses be kept segregated from the participants, but the witnesses should also be kept segregated from each other—before, during, and immediately after the confrontation. The police should refrain from making any remarks

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[121]Kirby v. Illinois, 406 U.S. 682 (1972).

[122]United States v. Ash, 413 U.S. 300 (1973).

[123]*See* United States v. Wade, 388 U.S. 218, 237 (1967). *See also* Note, 14 LOYOLA L. REV. 222, 237-38 (1967-68).

[124]Note, 28 LA. L. REV. 259, 263 (1968).

[125]Murray, *The Criminal Line-up at Home and Abroad*, 10 UTAH L. REV. 610, 627 (1966), *citing* PROYECTO DE CODIGO PROCESAL PENAL (Code of Criminal Procedure of Guatemala) art. 218 (1961); Note, 28 LA. L. REV. 259, 263 (1968).

[126]As a general rule, a police officer should not be a member of the lineup. There are certain situations, however, where the use of a police officer may be beneficial, if not necessary. See the text following note 73 *supra*.

[127]Annot., 39 A.L.R.3d 493 (1970).

about the participants and should not coax a witness in any manner to make an identification. Certainly a quick and positive identification is desired by the police, for it reinforces their efforts to bring the right person to justice. Although a quick identification is desirable, the police should not sacrifice accuracy for speed.

The confrontation should be conducted under good lighting conditions. The police should photograph the lineup,[128] and on the back of the photograph the name, age, weight, and height of each participant should appear. This photograph should be made available to the court, thereby perpetuating the image of the confrontation for future reference.

By implementing the above procedures, significant improvements in identification confrontations could be achieved. It is realized that implementation of these procedures and adoption of uniform guidelines requiring such procedures would not eliminate all of the evils presently engrained in most identification confrontations. Nevertheless, this inability to obtain perfection should not hinder efforts to ameliorate the present system.

Wendell H. Trapp, Jr.

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[128]Note, 28 La. L. Rev. 259, 263 (1968).

RECENT DECISIONS

UNIFORM COMMERCIAL CODE—HOLDER IN DUE COURSE—CONSUMER LENDER MAY BE HELD TO HIGHER STANDARD OF INQUIRY

Plaintiffs, homeowners in the District of Columbia,[1] brought an action in federal district court[2] against two savings and loan associations[3] seeking recision of negotiable consumer notes and restitution of money paid thereunder. The notes, individually executed by the plaintiffs and payable to the associations, were executed to finance home improvement contracts with Monarch Construction Company.[4] The plaintiffs asserted fraud in the factum, fraud in the inducement, unconscionability, and usury. Defendants denied the allegations and asserted holder in due course status. In a memorandum opinion the court *held*, for the plaintiffs. Where facts and circumstances give rise to a duty to inquire and give the lender reason to know of a defense, he can not claim holder in due course status if he fails to inquire or disregards the notice. *Slaughter v. Jefferson*

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[1]Plaintiffs proceeded individually and not as representatives of a class.

[2]Jurisdiction was based on D.C. CODE ANN. § 11-521(1) (1961).

[3]Jefferson Federal Savings & Loan Association and Montgomery Federal Savings & Loan Association. A finance company, Atlas Subsidiaries of Delaware, Inc., was also a defendant, but the issue with regard to Atlas is not the subject of this casenote.

[4]Monarch was not a party to the instant case.

The plaintiffs were residents of a low income area of Washington, D.C. They were all of limited education and intelligence, and some could neither read nor write. All but three, however, had experience in financial transactions such as involved here.

Employing a high pressure sales technique, salesmen of Monarch Construction Co. approached plaintiffs and persuaded them to sign home improvement contracts, which were always twice the costs of improvements and a reasonable profit. The salesmen misrepresented Monarch to be a governmental agency, and mislead plaintiffs as to the value of the proposed improvements and the financing costs. Upon completion of the contract work, an agent of Monarch, representing himself as the agent of the particular homeowner, would arrange a first trust loan through one of the associations. At settlement, which neither association attended, all of the debts of the homeowner were usually consolidated. Pre-existing debts would be paid first, with the result that first trust loan funds would frequently be expended before Monarch's contract was paid. In such a case, a second trust loan would be taken out. The homeowners were hurried through settlement, often signing papers without reading them and merely glancing at the others.

Jefferson received the loan applications from the agent along with the underlying contract. Jefferson's appraisal committee would examine the documents and view the homes. Settlement sheets were sent to Jefferson but were ignored. Jefferson knew nothing about Monarch and never inquired; it knew of no wrongdoing nor had its suspicions been aroused. Jefferson, however, had some direct contact with Monarch and knew about certain second and third trusts on the homeowners' property that Monarch had arranged through a ruse with other lending institutions to finance its operations. Fourteen percent of Jefferson's residential loan business was with Monarch.

Montgomery's position was similar to Jefferson's but with some distinctions. Montgomery did not receive the underlying contracts. It did, however, review the settlement sheets. Twenty-three percent of Montgomery's residential loan business was with Monarch.

Federal Savings & Loan Association, 361 F. Supp. 590 (D.D.C. 1973).

Under the Uniform Commercial Code (Code), the holder of an instrument who takes for value, in good faith, and without notice that the instrument is overdue or has been dishonored or of any defense against it is a holder in due course.[5] As such, he takes the instrument free from all claims to it and "all defenses of any party to the instrument with whom the holder has not dealt."[6] Although the payee on an instrument may be a holder in due course,[7] any involvement in the underlying transaction will preclude his claiming lack of notice.[8]

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[5]UNIFORM COMMERCIAL CODE § 3-302(1) [hereinafter cited as U.C.C.]. For a discussion of the holder in due course doctrine under the U.C.C. see Annot., 23 A.L.R.3d 932, 980-90 (1969).

During the late 16th century, the commercial law of England was administered by the courts of admiralty. These courts developed the rule that a bona fide purchaser of a negotiable instrument took free from all defenses. F. HART & W. WILLIER, COMMERCIAL PAPER UNDER THE UNIFORM COMMERCIAL CODE § 1.04[3], at 1-18 (1A BENDER'S U.C.C. SERV.). As a result of continuous jurisdictional feuds among the various court systems in England, common law courts assumed jurisdiction over commercial law matters. *Id.* § 1.04[4], at 1-19. The common law courts initially applied the bona fide purchaser doctrine of the admiralty courts—only actual bad faith would deprive a purchaser of his immunity to defenses. Within a short time, however, the courts reversed themselves and held that bona fide purchaser status would be negated if the instrument were taken under suspicious circumstances. Changing the rule again, the courts adopted a gross negligence rule. Ultimately the English common law courts returned to the original rule—a bona fide purchaser took free of all defenses, and only actual bad faith could negate his status. While the concept was undergoing this erratic development in England, the American courts were in the process of constructing a body of commercial law. Having looked primarily to England for precedent, two positions developed in the United States. Some courts applied the subjective actual bad faith standard while others adopted the objective suspicious circumstances test. W. BRITTON, HANDBOOK ON THE LAW OF BILLS AND NOTES 244-46 (2nd ed. 1961). In an effort to bring about uniformity and to give some structure to the otherwise amorphous body of the law of commercial paper, the Uniform Negotiable Instruments Law (N.I.L.) was prepared and adopted by all the states. *See* F. HART & W. WILLIER, *supra* §§ 1.05-.06. Under the N.I.L. the term of "bona-fide purchaser" was replaced with "holder in due course," and such holder was defined, in part, as one who has taken the instrument in good faith and without any notice of any infirmity or defect at the time of negotiation. NEGOTIABLE INSTRUMENTS LAW §§ 52-(3)-(4), *as found in* F. BEUTEL, BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (7th ed. 1948). Notice was defined as actual knowledge or knowledge of such facts that taking amounted to bad faith. *Id.* § 56. The N.I.L. purportedly adopted the rule of subjective bad faith, but the case treatment is very uncertain. F. HART & W. WILLIER, *supra* § 11.04, at 11-15 n.2. Experience revealed numerous shortcomings of the N.I.L. In an effort to correct these, along with deficiencies in other uniform acts dealing with commercial law, the Uniform Commercial Code was promulgated. *See* F. HART & W. WILLIER, *supra* § 1.06.

[6]U.C.C. § 3-305. Section 3-305(4) provides an exception for specified "real" defenses such as fraud in the factum.

[7]U.C.C. § 3-302(2).

[8]Morris v. Durbin, 123 Ga. App. 383, 180 S.E.2d 925 (1971); Program Aids Co. v. W.R. Bean & Son, Inc., 4 UCC REP. SERV. 210 (N.Y. Sup. Ct. 1967); Merit Bar & Fixture Mfg. Co. v. K Ranch, Inc., 3 UCC REP. SERV. 1154 (N.Y. County Ct. 1967).

The requirements of good faith and lack of notice for holder in due course status are closely related.[9] As originally drafted, the Code defined good faith as both honesty in fact and adherence to a reasonable commercial standard.[10] In 1956, however, the reasonable conduct element was deleted.[11] Thus, good faith under the present Code means "honesty in fact in the conduct or transaction concerned."[12] The standard is a subjective one,[13] looking to the mind of the holder.[14] While a reasonable care standard is no longer applicable,[15] negligence on the part of the holder may evidence lack of good faith.[16] The determination of good faith is based on all the circumstances.[17] Courts have found it lacking where it is shown that the holder had actual knowledge of some defense,[18] where he had knowledge of facts and circumstances which may create a defense,[19] where he had knowledge of facts sufficient to impute knowledge of a defense,[20] or where he was aware of the underlying transaction.[21] Although suspicious circumstances do not in themselves establish lack of good faith,[22] they may be evidence of it.[23] Also, suspicious circumstances give rise to a duty to inquire.[24] This duty is based on a theory of wilful ignorance,[25] and failure to inquire when

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[9]J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 14-6, at 471 (1972).

[10]U.C.C. §§ 1-201(19), 3-302(1)(b) (1952 version).

[11]THE AMERICAN LAW INSTITUTE AND NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 102-03 (1956).

[12]U.C.C. § 1-201(19). *See also id.* § 1-203.

[13]Industrial Nat'l Bank v. Leo's Used Car Exch., Inc., 291 N.E.2d 603 (Mass. 1973); Eldon's Super Fresh Stores, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 207 N.W.2d 282 (Minn. 1973). *Contra*, Jaeger & Branch, Inc. v. Pappas, 20 Utah 2d 100, 433 P.2d 605 (1967).

[14]General Inv. Corp. v. Angelini, 58 N.J. 396, 278 A.2d 193 (1971), *noted in* 23 CASE W. RES. L. REV. 418 (1972).

[15]Riley v. First State Bank, 469 S.W.2d 812 (Tex. Civ. App. 1971).

[16]McConnico v. Third Nat'l Bank, 499 S.W.2d 874 (Tenn. 1973).

[17]Vandem Check Cashing Corp. v. Askin, 10 UCC REP. SERV. 839 (N.Y. City Civ. Ct. 1972).

[18]Central Bank & Trust Co. v. First N.W. Bank, 332 F. Supp. 1166 (E.D. Mo. 1971).

[19]Texico State Bank v. Hullinger, 75 Ill. App. 2d 212, 220 N.E.2d 248 (1966).

[20]United States Fin. Co. v. Jones, 285 Ala. 105, 229 So. 2d 495 (1969).

[21]Mountain Fin. Co. v. Powell, 474 P.2d 172 (Colo. Ct. App. 1970).

[22]Waltham Citizens Nat'l Bank v. Flett, 353 Mass. 696, 234 N.E.2d 739 (1968) (unstable financial background); Factors & Notes Buyers, Inc. v. Green Lane, Inc., 102 N.J. Super. 43, 245 A.2d 223 (Super. Ct. 1968) (disagreement between maker and payee as to true temper of note); Citizen's Nat'l Bank v. Fort Lee Sav. & Loan Ass'n, 89 N.J. Super. 43, 213 A.2d 315 (Super. Ct. 1965) (low or overdrawn account); Matathias v. Bel-Mar Laboratories, Inc., 2 UCC REP. SERV. 1161 (N.Y. Sup. Ct. 1965) (purchase at discount).

[23]General Inv. Corp. v. Angelini, 58 N.J. 396, 278 A.2d 193 (1971).

[24]*E.g.*, Winter & Hirsch, Inc. v. Passorelli, 122 Ill. App. 2d 372, 259 N.E.2d 312 (1970); Norman v. World Wide Distribs., Inc., 202 Pa. Super. 53, 195 A.2d 115 (1963). *Contra*, Factors & Notes Buyers, Inc. v. Green Lane, Inc., 102 N.J. Super. 43, 245 A.2d 223 (Super. Ct. 1968).

[25]Vandam Check Cashing Corp. v. Askin, 10 UCC REP. SERV. 839 (N.Y. City Civ. Ct. 1972).

the duty arises constitutes bad faith.[26]

The general notice provisions of the Code apply to the notice requirement of a holder in due course. These provisions state that a person has notice when "he has actual knowledge," when "he has received a notice or notification," or when "from all the facts and circumstances known to him . . . he has reason to know."[27] In addition to this general provision, section 3-304 lists specific situations where the purchaser of a negotiable insrument does or does not have notice. The notice requirement of section 1-201(25)(c) ("reason to know") includes a reasonable care standard.[28] Thus where one lacks knowledge of a defense, a determination of notice may be based on whether under the circumstances known to the holder, a reasonable man would have known or would have had reason to know of a defense or claim.[29] In applying this standard, courts have held that, standing alone, a holder's knowledge of prior complaints by other customers of transferor,[30] knowledge of an unstable financial condition on the part of the maker or a prior holder,[31] supplying forms to the transferor,[32] or purchasing at a normal discount[33] does not establish notice. On the other hand, courts have held that where documents executed as a part of the same transaction are received by the holder with the negotiable note the holder is charged with notice of defenses evidenced by such documents.[34] Notice of a defense or of facts constituting a defense gives rise to a duty to inquire, and failure to inquire when the duty arises constitutes bad faith.[35]

While Article 3 was not written with particular consideration for consumer

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[26]*See* General Inv. Corp. v. Angelini, 58 N.J. 396, 278 A.2d 193 (1971), which states that the duty arises:

> [W]here the circumstances of which [the holder] has knowledge rise to the level that the failure to inquire reveals a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a defense arising from the transaction.

278 A.2d at 197.

[27]U.C.C. § 1-201(25).

[28]Industrial Nat'l Bank v. Leo's Used Car Exchange, 46 Mass. App. Dec. 63, (1973); McConnico v. Third Nat'l Bank, 499 S.W.2d 874 (Tenn. 1973); Van Gohren v. Pacific Nat'l Bank, 8 Wash. App. 245, 505 P.2d 467 (Ct. App. 1973).

[29]Suits & Wells Equip. Co. v. Citizen's Nat'l Bank, 263 Md. 133, 282 A.2d 109 (1971).

[30]Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 196 N.E.2d 847 (1964).

[31]Texico State Bank v. Hullinger, 75 Ill. App. 2d 212, 220 N.E.2d 248 (1966); Waltham Citizens Nat'l Bank v. Flett, 353 Mass. 696, 234 N.E.2d 739 (1968); O.P. Ganjo, Inc. v. Tri-Urban Realty Co., 7 UCC Rep. Serv. 302 (N.J. Super. Law Div. 1970).

[32]Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. 620, 238 A.2d 446 (1967).

[33]Matathias v. Bel-Mar Laboratories, Inc., 2 UCC Rep. Serv. 1161 (N.Y. Sup. Ct. 1965).

[34]*E.g.*, United States Fin. Co. v. Jones, 285 Ala. 105, 229 So. 2d 495 (1969) (actual examination by holder required); Sanden v. Hanson, 201 N.W.2d 404 (N.D. 1972) (applying U.C.C. § 3-119); Fidelity Trust Co. v. Gardiner, 191 Pa. Super. 17, 155 A.2d 405 (1959) (unclear whether actual examination by holder required). *Contra*, Ocean First Nat'l Bank v. Baird, 9 UCC Rep. Serv. 1092 (N.Y. Sup. Ct. 1971).

[35]Oklahoma Nat'l Bank v. Equitable Credit Fin. Co., 489 P.2d 1331 (Okla. 1971); Fidelity Trust Co. v. Gardiner, 191 Pa. Super. 17, 155 A.2d 405 (1959).

transactions, the recent burgeoning of consumer credit purchasing has resulted in the application of the holder in due course doctrine to such transactions.[36] The policy problem faced in applying Article 3 of the Code to consumer transactions is one of balancing the need of the commercial community for the free negotiability of commercial paper against the need for consumers to retain their rights, primarily refusal to pay, when their sellers fail to perform.[37] Some states have enacted legislation providing that consumer notes are non-negotiable.[38] Likewise, some courts have shown great concern for the consumer who is victimized by an unscrupulous seller,[39] indicating that a *higher* standard of conduct could be imposed on consumer lenders.[40] Other courts, however, have remained discouragingly insensitive to the consumers' plight.[41] Within the context of consumer credit cases, many courts have adopted a close connectedness test for determining holder in due course status. Where the facts and circumstances show a close relationship between the holder of a negotiable consumer note and his transferor (usually payee on the instrument), such status is denied.[42]

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[36]F. HART & W. WILLIER, *supra* note 5, § 11.07[1], at 11-30, 11-33 to -34.

[37]Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

[38]*E.g.*, MASS. GEN. LAWS ANN. ch. 255, § 12C (Supp. 1973), *construed in* Alcoa Credit Corp. v. Nickerson, 5 UCC REP. SERV. 152 (Mass. 1968).

[39]Educational Beneficial, Inc. v. Reynolds, 67 Misc. 2d 739, 324 N.Y.S.2d 813 (N.Y. Civ. Ct. 1971).

[40]General Inv. Corp. v. Angelini, 58 N.J. 396, 278 A.2d 193 (1971).

[41]Fuller v. American Aluminum Corp., 249 So. 2d 410 (Miss. 1971), *noted in* 43 MISS. L.J. 228 (1972).

[42]J. WHITE & R. SUMMERS, *supra* note 9, § 14-8, at 479. In Unico v. Owen, 50 N.J. 101, 232 A.2d 405, 410 (1967), *noted in* 24 RUTGERS L. REV. 500 (1970), the court stated:

> The basic philosophy of the holder in due course status is to encourage free negotiability of commercial paper by removing certain anxieties of one who takes the paper as an innocent purchaser knowing no reason why the paper is not as sound as its face would indicate. It would seem to follow, therefore, that the more the holder knows about the underlying transaction, and particularly the more he controls or participates or becomes involved in it, the less he fits the role of a good faith purchaser for value; the closer his relationship to the underlying agreement which is the source of the note, the less need there is for giving him the tension-free rights considered necessary in a fast-moving, credit-expanding commercial world.

The courts which have employed the doctrine have founded it on good faith (Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967); Sterling Commercial Corp. v. White, 5 UCC REP. SERV. 516, 518 (N.Y. Sup. Ct. 1968)), agency (*e.g.*, Calvert Corp. v. Williams, 244 A.2d 494, 496 (D.C. Ct. App. 1968); Timeplan Corp. v. Fuxa, 9 UCC REP. SERV. 262 (Okla. Ct. App. 1971)), or unity of identity (*e.g.*, Jones v. Approved Bancredit Corp., 256 A.2d 739, 742 (Del. 1969)). A comparison of the cases applying, in name or in principle, the close connectedness test reveals that the facts and circumstances most persuasive in finding the requisite closeness of relationship are:

(1) Intermingling of directors or officers. *E.g.*, Timeplan Corp. v. Fuxa, *supra* at 263. *But see* Milwaukee Acceptance Corp. v. Dore, 43 Wis. 2d 412, 168 N.W.2d 594 (1969).

(2) Inter-relationship of ownership of holder and transferor. Jones v. Approved Bancredit Corp., *supra*; *see* Randolph Nat'l Bank v. Vail, 12 UCC REP. SERV. 906, 908 (Vt.

The court in the instant case held that with regard to the charge of fraud in the factum, the plaintiffs failed to demonstrate that they did not have an opportunity to learn of the contents of the documents they signed. As to the charge of usury, the court held that since the loans were in accordance with existing law at the time they were made, they were not usurious *ab initio*. The court did hold, however, that both fraud in the inducement and unconscionability were established. Thus, whether defendants were holders in due course was crucial.[13] In finding that defendants were not holders in due course the court reasoned that since both defendants: carried on a continuous and substantial business with Monarch Construction Company; knew the contracts were being written on marginal properties; knew that many of the homeowners were of limited intelligence and, as a class, were apt to be heavily burdened with debt; knew that many contracts were being refinanced out of other satisfactory notes of reputable financial institutions having lower interest rates and lower monthly payments; knew that the agent's role was duplicitous; had available to them the contracts and settlement sheets which revealed internal and comparative irregularities; and since lenders who facilitate consumer credit transactions are chargeable with a *high* standards to ensure their services are not misused; then a duty to inquire into the underlying transaction fell upon defendants. Failing to inquire, defendants lacked good faith and were therefore not holders in due course. The court further held that since defendants were on notice because they "should have known" of possible defenses, they failed to qualify as holders in due course.

Under the Uniform Commercial Code, good faith and notice are separate and distinct concepts.[14] The courts, however, often fail to clearly recognize the substantive distinctions, especially concerning good faith and "reason to know" notice.[15] Good faith is subjective, looking to the actual knowledge of the holder, while "reason to know" expresses an objective test based on the reasonable man standard. The instant decision, which found lack of good faith because of wilful

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1973). *But see* Milwaukee Acceptance Corp. v. Dore, *supra*.

(3) Transferor's operation subject to substantial control by holder. *E.g.*, Calvert Credit Corp. v. Williams, *supra*; Unico v. Owen, *supra*.

(4) A substantial amount of holder's business is with transferor. *E.g.*, American Plan Corp. v. Woods, 16 Ohio App. 2d 1, 240 N.E.2d 886, 888-89 (1968). *But see* Milwaukee Acceptance Corp. v. Dore, *supra*.

(5) Holder-financier organized for purpose of financing transferor's operations. *E.g.*, Educational Beneficial, Inc. v. Reynolds, 67 Misc. 2d 739, 324 N.Y.S.2d 813, 817-18 (N.Y. Civ. Ct. 1971).

(6) Underlying written agreement regulates relationship between transferor and financier. *E.g.*, Unico v. Owen, *supra*. *Contra*, Milwaukee Acceptance Corp. v. Dore, *supra*.

(7) Holder provided or approved forms used by transferor. *E.g.*, Jones v. Approved Bancredit Corp., *supra* at 741.

(8) Holder approved or established transferor's sales plan. *E.g.*, Calvert Credit Corp. v. Williams, *supra*; *see* American Plan Corp. v. Woods, *supra*.

[13]*See* § 3-305. Unlike fraud in the factum, fraud in the inducement cannot be asserted against a holder in due course. Thus, defendant's status was critical.

[14]*See* J. WHITE & R. SUMMERS, *supra* note 9, § 14-6.

[15]*E.g.*, Sullivan v. United States Dealers Corp., 486 S.W.2d 699 (Ky. Ct. App. 1972).

ignorance, is illustrative of the confusion of the two concepts. If the court concluded from the evidence that defendants had actual knowledge of facts which gave rise to a duty to inquire, then its finding of lack of good faith is consistent with the subjective standard. If the court reasoned, however, that defendants did not act in good faith since under the circumstances financial lenders should have known of facts which gave rise to a duty to inquire but failed to do so, then the court misapplied an objective test of good faith. While it is possible that the defendants possessed the requisite knowledge for a proper finding of bad faith, two factors lead one to believe that the court improperly applied an objective test in determining lack of good faith. First, the court implies that had the defendants exercised reasonable care, they would have discovered certain facts which would have lead to actual knowledge of the defenses against them.[46] Also, the court's examination of the facts seems to center as much on defendants' negligent conduct as on their wilful ignorance.[47] Ultimately, whether the instant court misapplied the good faith requirement is immaterial because clearly the defendants had reason to know of facts constituting a defense and therefore were not holders in due course. It is important, however, that courts recognize the distinction in order that the concept of holder in due course develop in a principled and understandable manner.

In its application of law and holding, the instant decision is representative of numerous prior cases. The true significance of the case is the dicta statement that consumer lenders are held to a high standard of inquiry to ensure that their services are not misused by unscrupulous sellers.[48] While some courts have indicated a higher standard could be applied to consumer lenders,[49] this is the first case to unequivocably state that such a standard is applicable. The adoption of this standard by the instant court reflects the trend toward consumer protection throughout our society. If this standard is seized upon by other courts, it will result in a shift in the balance between the interests of the commercial community and that of the consumer. Given the knowledge and resources of financial lenders and the vulnerability of many consumers, it is not an unreasonable shift. Any additional burden imposed on lenders will be negligible for the honest, and will hopefully force the unscrupulous out of business.

Robert T. Gordon, Jr.

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[46]Slaughter v. Jefferson Fed. Sav. & Loan Ass'n., 361 F. Supp. 590, 600 (D.D.C. 1973).

[47]*Id.* at 599-600.

[48]*Id.* at 600.

[49]General Inv. Corp. v. Angelini, 58 N.J. 396, 278 A.2d 193 (1971); *see* Educational Beneficial, Inc. v. Reynolds, 67 Misc. 2d 739, 324 N.Y.S.2d 813 (N.Y. Civ. Ct. 1971).

TORTS—LIBEL—CONDITIONAL PRIVILEGE FOR CREDIT REPORTING AGENCIES REJECTED

Plaintiff filed suit in Federal District Court for the Northern District of Georgia against the defendant, a credit reporting agency, for libel arising out of allegedly defamatory statements.[1] Plaintiff contended that four statements contained in a credit report prepared and distributed by the defendant to 11 subscribers were false, defamatory, and tended to injure the plaintiff's credit and business reputation.[2] The district court granted defendant's motion for a summary judgement on the grounds that a conditional privilege existed for credit reporting agencies under Georgia law and that the plaintiff failed to prove the malice necessary to overcome the privilege.[3] On appeal to the Fifth Circuit Court of Appeals, *held*, reversed and remanded. Credit reporting agencies, because of changing concepts in consumer protection, are not entitled to the defense of conditional privilege in libel suits. *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3523 (U.S. Mar. 18, 1974) (No. 73-1159).

Since World War II, consumer credit has grown phenomenally.[4] Consequently, an expansive credit reporting industry has developed[5] and, until recently,[6] has flourished in an atmosphere virtually free from legislative or

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[1]Plaintiff was a contractor engaged in the construction of filling stations in the Atlanta, Georgia area. Plaintiff contended that the defendant secretly circulated libelous credit reports which resulted in a loss in net taxable income of $15,365.42. Plaintiff sought general damages of $250,000, special damages of $34,000, exemplary damages of $1 million and attorney's fees of $50,000. Brief for Plaintiff-Appellant at 2-3, Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973).

[2]The four statements were:

(1) In interview of October 10, 1968 Mrs. Hood referred all details to her husband who has been inavailable [*sic*] for comment to date.

(2) As a matter of interest, David P. Hood has always declined financial information other than to say that sales are in excess of $100,000 and that net worth is in excess of $3,000. These two estimates were submitted in July 1967.

(3) Public records reveal suit #248479 filed June 10 1968, [*sic*] for $103, Whittock Dobbs Inc. vs. subject. Also suit #238558 filed Apr 3 1968, [*sic*] Westron Corp. vs. subject.

(4) Although complete details are not available, working capital appears limited at times with some trade, slowness noted.

Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170, 172-73 (N.D. Ga. 1971).

[3]*Id.* at 179.

[4]Outstanding consumer credit increased from $5.7 billion at the end of World War II to $110 billion in 1967. *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess., at 12 (1969). *See* Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035 n.1 (1971).

[5]*See, e.g.*, Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509 (1968-69); Comment, *The Fair Credit Reporting Act Amendments: Enforcement of the Legislative Trust?*, 45 MISS. L.J. 95, nn.9-11 and accompanying text (1974); Note, *Protecting the Subjects of Credit Reports, supra* note 4, at 1036.

[6]The Fair Credit Reporting Act, which became effective April 25, 1971, was the first

administrative regulation.[7] Abuse of the consumer resulted from this regulatory void.[8] In the past, the leading judicial remedy for such abuse has been a tort action for libel.[9] The beleaguered consumer rarely recovered, however, because of a conditional privilege for credit reporting agencies in the majority of jurisdictions.[10]

Although "conditional privilege"[11] has been recognized as a defense for credit reporting agencies in the United States,[12] England rejected the doctrine in *MacIntosh v. Dun* in 1908.[13] The English refusal to recognize the privilege prompted an American legal scholar to write an article in rebuttal to the decision.[14] This article, written in 1914, provided much of the rationale which until now has been utilized as justification for granting the privilege to credit reporting agencies.[15] One reason advanced in the article for the privilege was that in a credit oriented society the merchant must rely on a middleman (*i.e.*, a credit reporting agency) to verify the solvency of potential debtors.[16] A second reason advanced was that failure to allow a conditional privilege would effectively

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comprehensive federal legislation to regulate the credit reporting industry. 15 U.S.C. §§ 1681-1681t (1970) [hereinafter cited as FCRA].

[7]Note, *The Fair Credit Reporting Act*, 56 MINN. L. REV. 819 (1972). At the time of the FCRA passage only one state had adopted legislation to regulate credit reporting agencies. OKLA. STAT. ANN. tit. 24, §§ 81-85 (1955). *See* Comment, *Protection of the Consumer Interests and the Credit Rating Industry*, 2 PAC. L.J. 635, 653-54 (1971).

[8]*See, e.g.*, M. BRENTON, THE PRIVACY INVADERS 25-58 (1964); V. PACKARD, THE NAKED SOCIETY 47-72 (1964); Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091, 1141-42 (1969).

[9]Comment, *The Consumer vs. the Credit Bureau: Whom Does the Law Protect?*, 7 CALIF. WESTERN L. REV. 216, 218 (1970); Note, *Credit Investigations, supra* note 5, at 513; Note, *Consumer Protection: Regulation and Liability of the Credit Reporting Industry*, 47 NOTRE DAME LAW. 1291, 1297 (1972); Comment, *supra* note 7, at 649.

[10]W. PROSSER, LAW OF TORTS § 115, at 790 (4th ed. 1971); 15 AM. JUR. 2d *Collection & Credit Agencies* § 22, at 573 (1964); Note, *Protecting the Subjects of Credit Reports, supra* note 4, at 1050 nn.86-87; Annot., 30 A.L.R.2d 776 (1953).

[11]A conditionally privileged communication is:

> [o]ne made in good faith on any subject matter in which the person publishing has an interest, or . . . a duty, if made to a person having a corresponding interest or duty, even though . . . otherwise . . . actionable.

BLACK'S LAW DICTIONARY 367 (4th ed. rev. 1968), *citing* Cook v. East Shore Newspapers, 327 Ill. App. 559, 64 N.E.2d 751, 760 (1945). *See* W. PROSSER, *supra* note 10, § 115, at 786 (conditional privilege is termed "qualified" or "determinable" in some jurisdictions).

[12]*See* note 10 *supra*.

[13][1908] A.C. 390 (P.C.).

[14]Smith, *Conditional Privilege For Mercantile Agencies — MacIntosh v. Dun*, 14 COLUM. L. REV. 187 (1914).

[15]*See* Note, *Protecting the Subjects of Credit Reports, supra* note 4, at 1052. The premise underlying Smith's rationale had been attacked by modern legal writers. *See, e.g., id.* at 1053-54; Ullman, *Liability of Credit Bureaus After the Fair Credit Reporting Act: The Need for Further Reform*, 17 VILL. L. REV. 44, 48-50 (1971).

[16]*See* Smith, *supra* note 14, at 201.

destroy the credit reporting system.[17] Moreover, it was suggested that any injury to individual credit applicants caused by credit reports would be outweighed by the benefits to the credit system as an entity.[18]

The overwhelming majority of American jurisdictions accepted this reasoning and followed the general rule that a good faith report distributed by a credit agency to a subscriber with a legitimate interest is conditionally privileged.[19] Mississippi adopted this doctrine in 1961 in *Retail Credit Co. v. Garraway*.[20] Only two jurisdictions have had judicial opinions which reject the privilege and the last case to do so was in 1914.[21] The privilege is conditional, however, and may be defeated if malice can be proven.[22] Since the existence of malice is difficult to establish, some courts have abandoned it as an essential element of the cause of action.[23] To replace it several jurisdictions have substituted either "absence of reasonable or probable cause to believe the statement,"[24] or "wanton and reckless disregard for the rights of others."[25] Most courts have refused to deny the privilege where only negligence has been shown.[26] Lack of due care, however, has been deemed sufficient in a few jurisdictions.[27] Another abuse which may result in loss of the privilege is general distribution of credit reports to those who do not have a sufficiently legitimate interest.[28] A few early decisions

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[17]*Id.*

[18]*Id.* at 207.

[19]*See, e.g.*, Wilson v. Retail Credit Co., 325 F. Supp. 460 (S.D. Miss. 1971); Serino v. Dun & Bradstreet, Inc., 267 F. Supp. 396 (D.S.C. 1967); Garraway v. Retail Credit Co., 244 Miss. 376, 141 So. 2d 727 (1962); Retail Credit Co. v. Garraway, 240 Miss. 230, 126 So. 2d 271 (1961); Bartels v. Retail Credit Co., 185 Neb. 304, 175 N.W.2d 292 (1970); Trim-A-Way Figure Contouring, Ltd. v. National Better Business Bureau, Inc., 37 App. Div. 2d 43, 322 N.Y.S.2d 154 (1971); Dun & Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896 (Tex. 1970). *See* note 10 *supra*.

[20]240 Miss. 230, 126 So. 2d 271 (1961).

[21]Johnson v. Bradstreet Co., 77 Ga. 172 (1886); Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914).

[22]W. Prosser, *supra* note 10, § 115, at 790; Note, *Liability for Misstatements by Credit-Rating Agencies*, 43 Va. L. Rev. 561, 562 (1957).

[23]*See* Note, *Credit Investigations*, *supra* note 5, at 516; Note, *Protecting the Subjects of Credit Reports*, *supra* note 4, at 1050-51.

[24]Stationers Corp. v. Dun & Bradstreet, Inc., 62 Cal. 2d 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965); *See* Cullum v. Dun & Bradstreet, Inc., 228 S.C. 384, 90 S.E.2d 370 (1955).

[25]*E.g.*, A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc., 245 F.2d 775 (2d Cir. 1957); H.E. Crawford Co. v. Dun & Bradstreet, Inc., 241 F.2d 387 (4th Cir. 1957); *see* Mil-Hall Textile Co. v. Dun & Bradstreet, Inc., 160 F. Supp. 778 (S.D.N.Y. 1958).

[26]Note, *Credit Investigations*, *supra* note 5, at 516; *e.g.*, Mil-Hall Textile Co. v. Dun & Bradstreet, Inc., 160 F. Supp. 778 (S.D.N.Y. 1958); Stationers Corp. v. Dun & Bradstreet, Inc., 62 Cal. 2d 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965); Petition of Retailers Commercial Agency, 342 Mass. 515, 174 N.E.2d 376 (1961).

[27]*E.g.*, Altoona Clay Prods., Inc. v. Dun & Bradstreet, Inc., 367 F.2d 625, 631-32 (3d Cir. 1966).

[28]*See, e.g.*, Watwood v. Stone's Mercantile Agency, Inc., 194 F.2d 160 (D.C. Cir.), *cert. denied*, 344 U.S. 821 (1952); Erber & Stickler v. R.G. Dun & Co., 12 F. 526 (C.C. Ark. E.D. 1882); Dun & Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896 (Tex. 1970), *rev'g*

also rejected conditional privilege on the basis that the credit agency's profit motive in furnishing the information removed it from the scope of protection.[29]

A discussion of conditional privilege (in relation to judicial remedies available to consumers) is incomplete without mention of legislative efforts in recent years to protect credit consumers. The first comprehensive national legislation to regulate the consumer credit industry was enacted in 1970.[30] This legislation, the Fair Credit Reporting Act[31] (FCRA), was a Congressional reaction to the scope and potential of consumer abuse in the United States.[32] The inadequacy of judicial remedies for the consumer, including the shield of conditional privilege for credit bureaus, contributed to the realization of the FCRA.[33] Prior to the passage of the FCRA, only one state had acted to implement a regulatory scheme for the credit reporting business.[34] Since that time, several jurisdictions have acted to halt consumer abuse caused by credit reports.[35]

Although the court in the instant case followed early Georgia decisions,[36] the importance of the instant ruling lies in the court's application of new reasons for denying the conditional privilege.[37] The court, recognizing the blind adherence which American courts have given the rationale behind the privilege and the fact that its 1914 logic has since become antiquated,[38] found two reasons demanding the refutation of such a rationale. The old logic contended that removal of the conditional privilege shield would bring the demise of credit reporting agencies with resulting injury to the country's commercial growth. The

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O'Neil v. Dun & Bradstreet, Inc., 448 S.W.2d 153 (Tex. 1969); Note, *Credit Investigations*, *supra* note 5, at 514-15.

[29]McNamara, *The Fair Credit Reporting Act: A Legislative Overview*, 22 J. PUB. L. 67, 71 (1973), *citing* Johnson v. Bradstreet Co., 77 Ga. 172 (1886); MacIntosh v. Dun, [1908] A.C. 390 (P.C.); Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914).

[30]Note, *Consumer Protection*, *supra* note 9, at 1296.

[31]15 U.S.C. §§ 1681-1681t (1970).

[32]Note, *The Fair Credit Reporting Act*, 23 MAINE L. REV. 253, 256 (1971); *see* McNamara, *supra* note 29, at 71-88.

[33]*See* Comment, *The FCRA Amendments*, *supra* note 5, at 95.

[34]OKLA. STAT. ANN. tit. 24, §§ 81-85 (1955).

[35]ARIZ. REV. STAT. ANN. §§ 44-1691 to -1696 (Supp. 1973-74); CAL. CIV. CODE §§ 1750-57 (West 1971); CONN. GEN. STAT. ANN. §§ 36-431 to -435 (Supp. 1973); MASS. ANN. LAWS ch. 93, §§ 50-68 (1972); N.M. STAT. ANN. §§ 50-18-1 to -18-8 (Supp. 1973); N.Y. GEN. BUS. LAW § 370 (McKinney Supp. 1973-74); TEX. PENAL CODE art. 1546(b), §§ 1-3 (Supp. 1974).

[36]Western Union Tel. Co. v. Pritchett, 108 Ga. 411 (1899); Johnson v. Bradstreet Co., 77 Ga. 172 (1886).

[37]The court analyzed three other issues in the decision which are beyond the scope of this casenote:

> (1) [W]hether . . . the statements are libelous, and if so, . . . whether they are libelous per se; (2) whether defendant is entitled to a conditional constitutional privilege under the First Amendment and *New York Times v. Sullivan*, 376 U.S. 254 . . . and (4) the necessary proof of damages.

486 F.2d at 27.

[38]*See* notes 15 through 19 *supra* and accompanying text.

instant court pointed out that this argument was effectively rebutted by the existence of a thriving and profitable credit industry in each of the American jurisdictions which had previously rejected conditional privilege.[39] The court further stated that a second compelling reason for rejection of the privilege is the significant change in attitude, manifested by the passage of the FCRA, from shielding the credit reporting industry to protection of the individual consumer. The court concluded that for these reasons the conditional privilege should have been rejected by the district court.[40]

The instant decision can have a momentous effect in granting individual consumers a judicial remedy for abuses perpetrated by a multi-billion dollar industry which heretofore has been virtually "untouchable." Proponents of privilege for credit reporting agencies will undoubtedly hasten to claim that the FCRA has provided consumers with all the protection which is necessary. A survey of the many legal writings which have analyzed the FCRA and enumerated its shortcomings, however, illustrates the fallacy of such an argument.[41] The most obvious defect in the FCRA is the provision which precludes the common law actions for defamation, negligence, or invasion of privacy if the consumer bases his action on information obtained pursuant to the mandatory disclosure sections of the FCRA.[42] Since the credit agency has sole possession of the consumer's credit file and therefore any evidence of defamation, this provision presents an unenviable choice to the consumer who has been libeled; he may obtain the evidence and lose the cause of action, or he may bring the suit and lose the evidence.[43] Another proposition which will be advanced by those doubting the importance of the instant decision is that the opinion merely followed early Georgia precedent which rejected conditional privilege.[44] Therefore, the argument will be that jurisdictions which have accepted the conditional privilege doctrine may continue to do so under stare decisis. The logic of this argument is effectively rebutted by the instant decision wherein it was stated: "We . . . are not immutably bound . . . to follow state court decisions where it appears that a state court considering the identical issue would not rely on such precedent."[45] Additionally, the reasoning in the decision is sound and no rational explanation can be conceived of which would allow the court in a future case to reverse its course and reject such "irresistible logic."[46] The Fifth Circuit

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[39]*See* 486 F.2d at 32 n.18, *citing* UNIVERSITY OF IDAHO, CREDIT PRACTICES OF FURNITURE AND HOME APPLIANCES IN TWO NORTHWEST CITIES (1963); Comment, *Protecting the Subjects of Credit Reports*, *supra* note 4, at 1051.

[40]A brief dissent by Judge Ainsworth contended the majority rule should be followed and conditional privilege granted. 486 F.2d at 34.

[41]*See generally* McNamara, *supra* note 29; Ullman, *supra* note 15; Note, *The FCRA*, *supra* note 32; Note, *The FCRA*, *supra* note 7; Comment, *The FCRA Amendments*, *supra* note 5; Note, *Consumer Protection*, *supra* note 9.

[42]15 U.S.C. § 1681h(e) (1970).

[43]Senator Proxmire has filed a bill to repeal this section of the FCRA. 119 CONG. REC. § 15604 (daily ed. Aug. 3, 1973).

[44]*See* Comment, *The FCRA Amendments*, *supra* note 5, at 103.

[45]486 F.2d at 31.

[46]*Id.* at 32.

Court of Appeals has taken a significant step in protecting consumers from credit reporting abuse. Other jurisdictions should follow this lead and adopt the sagacious reasoning set forth in *Hood v. Dun & Bradstreet*.[47] The defense of conditional privilege for credit reporting agencies is an anomaly in a consumer-oriented system of jurisprudence and should be rejected.

William B. Wicker

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[47]486 F.2d 25 (5th Cir. 1973).

BOOK REVIEWS

HAZARDOUS PRODUCTS LITIGATION by EDWARD M. SWARTZ
Rochester, New York: Lawyer's Co-Operative Publishing Company. 1973. Pp. 416. $35.00.

*Gibson B. Witherspoon**

Since President Nixon signed the Consumer Product Safety Act into law October 27, 1972, the number of small products liability suits has greatly increased. The Act established an independent regulatory agency with extremely broad powers to protect consumers from unreasonable risk of injury from hazardous products. All consumer products are broadly covered, including any article or component part thereof (foreign and domestic) which is manufactured, distributed or retailed. Projected against this background of sophisticated consumer legislation, *Hazardous Products Litigation* offers the reader 101 fact patterns or actual cases taken from the author's files comprising such topics as: household products, electrical appliances, flammable materials, fabrics, gas explosions, cartons, containers, bottles, toys, sports, playground and recreational equipment, allergic reactions, food, beverages, medications, and many miscellaneous products.

Of all the chapters in the manuscript, the discovery chapter is probably the most practical and valuable. Especially edifying is the discovery checklist which offers methods of determining the chain of supply and attaching liability. In addition to this checklist, the author furnishes many forms used in admitting facts, genuineness of documents, requests for production of documents and products for inspection and photographing. Since each complaint, interrogatory, and deposition corresponds to the selected fact pattern, a case can easily be followed from beginning to end. The author concludes the chapter by stating that "[i]t is of the utmost importance that plaintiff's counsel make the fullest and most creative uses of the investigatory opportunities afforded by the discovery processes."

In the recovery chapter, Swartz discusses three prominent theories—negligence, breach of warranty (expressed or implied), and strict liability in tort. Explaining these theories in detail, he annotates several leading cases and provides a catalogue of substantive actions available to attorneys. Separate chapters on damages and trial procedure buttress the three theories of recovery and offer extensive treatment of cross-examination and problems of proof.

The volume is fundamentally a procedurally oriented work, but explains, explores, and suggests a framework on which to rest legal liability. Annotated guidelines which will significantly improve legal proceedings are most helpful and will provide a starting point in any class of product litigation. Also, the index leads to a great wealth of additional research materials. Although comparatively short, this concise, well-written treatise, deserves a space on an attorney's library shelf.

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*Witherspoon, Compton & Mason; Meridian, Mississippi.

Cases and Materials on Environmental Law

Oscar S. Grant,* editor. Washington, D.C.: The Bureau of National Affairs. 1973. Pp. 1420. $19.50.

*Eugene T. Holmes***

Professor Gray states in the preface to this second edition that his book is intended as a "sourcebook for law courses and for practitioners." It is certainly that, although its length and diversity—seven chapters running the entire gamut of areas traditionally covered in the environmental law field—effectively preclude its being covered completely in the typical 3-hour environmental law course. Professor Gray recognizes this fact and suggests several approaches for utilizing portions of the book as the basis for a 3-hour course.

Chapter 1 deals briefly with the historical common law approach to environmental problems, and then deals extensively with the National Environmental Policy Act of 1969 (NEPA), the plethora of litigation spawned by it, the Environmental Quality Improvement Act of 1970, two Executive Orders implementing NEPA, and the Guidelines of the Council on Environmental Quality. As is his practice throughout the book, Professor Gray sets forth the full text of relevant statutes and regulations, with short annotations describing their legislative or administrative history.

Chapter 2 covers statutes, regulations, and decisions on public lands and rivers, fish and wildlife, wetlands, and the sea. An overview of water law and international conventions on the sea and seabed is also included. Of course, the chapter also deals with the doctrinal issues of preemption, standing to sue, and sovereign immunity, including the landmark *Data Processing* case and *Sierra Club v. Morton*.

Chapter 3 deals extensively with air and water pollution control legislation, including the legislative histories and texts of the Clean Air Act, as amended, and the Federal Water Pollution Control Act (including the lengthy 1972 amendments). The effects of the energy crisis on the Clean Air Act are not dealt with in the main volume, but should receive much of the attention of the annual supplement. Other functional areas covered by Chapter 3 include solid waste management, historic preservation, herbicides and pesticides, noise, aesthetics, utilities, real property acquisitions, international rules, and oil and hazardous material.

Chapter 4, "Federal Impacting Programs," covers the environmental deeds and misdeeds of the Corps of Engineers, the Federal Power Commission, the Department of Transportation, and the Department of Housing and Urban Development. Included are the Rivers and Harbors Act of 1899, both *Scenic Hudson* cases, *Citizens to Preserve Overton Park v. Volpe*, and a number of other statutes, cases, and regulations; however, the Tennessee Valley Authority, Atomic Energy Commission, Interior Department, and Bureau of Reclamation are strangely absent.

Chapter 5, "The Planning Process," includes a detailed case study of the

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Miami jetport project, sections on transportation planning, water resources planning, and national land use planning, as well as parts of the Demonstration Cities and Metropolitan Development Act of 1966. This chapter should receive extensive supplementation for next year because of two major new developments: Senator Jackson's National Land Use Bill which may get through Congress this spring, and the Environmental Protection Agency's proposed indirect (or complex) source emissions standards, to take effect January 1, 1975.

Chapter 6, "Public Action and the Courts," examines common law remedies and defenses, the public trust doctrine, the public use requirement in eminent domain, and citizen suits. The Administrative Procedure Act and basic doctrines of administrative law (*e.g.*, the substantial evidence rule of *Universal Camera*) are covered, as well as Michigan's statute allowing citizen actions to protect the environment. Regrettably, the citizen suit provisions of the Clean Air Act (§ 304), the Federal Water Pollution Control Act (§ 505), and the Noise Control Act (§ 12) are not gathered here but are indexed in the back of the book. Additionally, it is difficult to separate the general notion of private attorneys general, as discussed here, from the doctrinal hurdles of sovereign immunity, standing, and preemption discussed in Chapter 2.

Chapter 7, "Quo Vadis," takes a short but cogent look (as the title implies) at where Spaceship Earth is heading. Included are excerpts from such noted environmentalists as Falk, Reitze, and Hans Landsberg of Resources for the Future, a national environmental organization.

Professor Gray's book is adequately indexed and organized for quick reference and is the most complete 1-volume work on environmental law to date. Although publication of a hard-bound volume on so volatile a field as environmental law is risky, the device of annual supplements should suffice to keep *Cases and Materials on Environmental Law* reasonably current. Professor Gray's 1973 edition of *Cases and Materials on Environmental Law* should prove just as valuable as the original 1970 version, and the annual supplements should keep it useful much longer.

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